TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. ~~342~~ 34.

FRED HEWITT, PLAINTIFF IN ERROR,

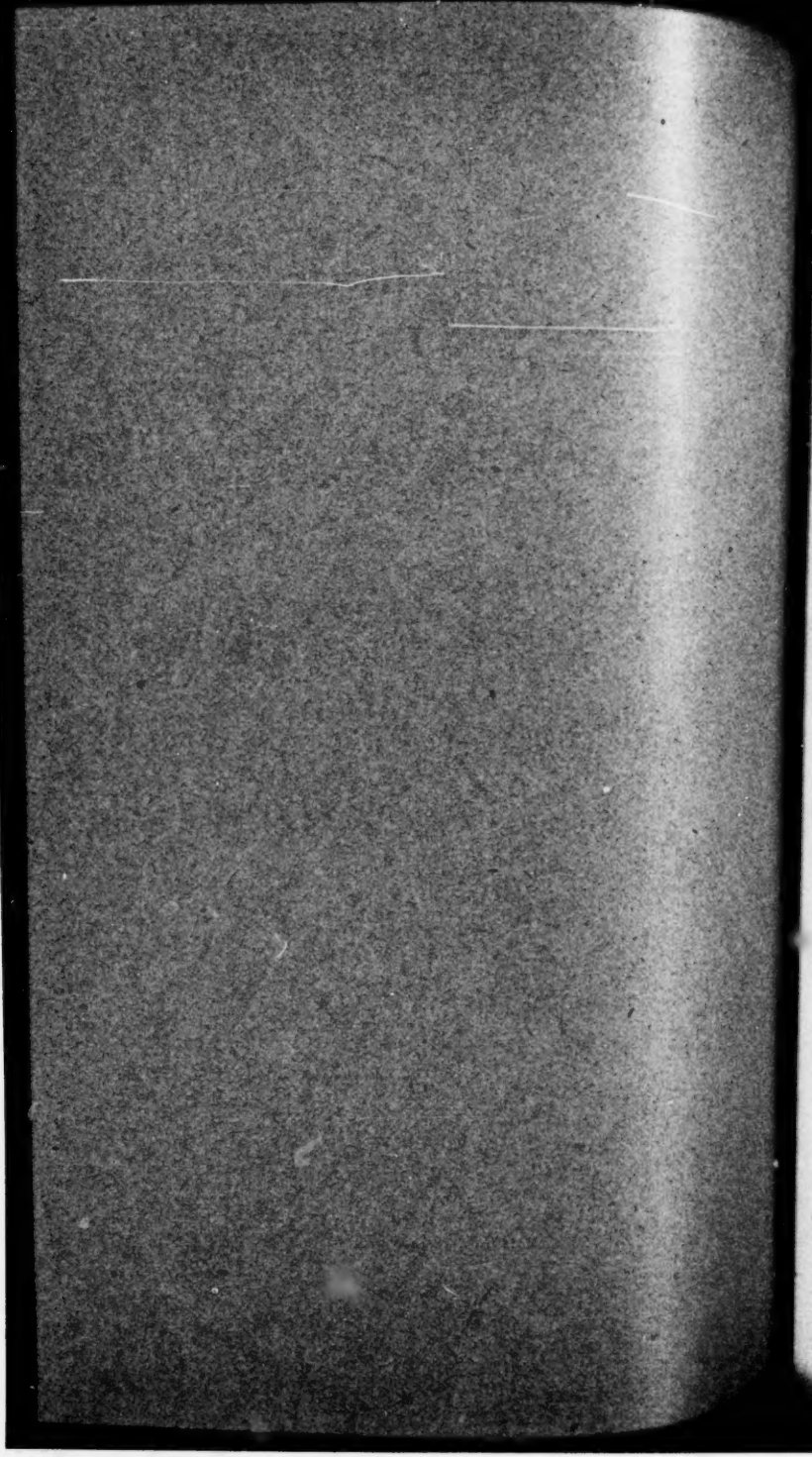
vs.

EMIL SCHULTZ AND FRIEDERIKA SCHULTZ.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

FILED MARCH 26, 1900.

(17,336.)



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a UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable supreme court of the State of North Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of North Dakota, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had, in a suit between Fred Hewitt, plaintiff, and Emil Schultz and Friederika Schultz, defendants, wherein was drawn in question the validity of a statute or an authority exercised under the United States and the decision was against its validity, a manifest error hath happened, to the great damage of the said Fred Hewitt, as by his complaint appears, we, being willing that error, if any hath been, shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington within sixty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, this 10th day of January, in the year of our Lord one thousand eight hundred and ninety-nine.

[Seal Circuit Court of the United States, District of North Dakota.]

J. A. MONTGOMERY,
Clerk of Circuit Court of the United States,
District of North Dakota.

The above writ is hereby allowed.

J. M. BARTHOLOMEW,
Chief Justice of Supreme Court of North Dakota.

Filed Jan. 23, 1899.

R. D. HOSKINS, *Clerk.*

b United States of America to Emil Schultz and Friederika Schultz, Greeting:

You and each of you are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within sixty (60) days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the supreme court of the State of North Dakota, wherein Fred Hewitt is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ

mentioned, should not be corrected and speedy justice not be done in that behalf.

Witness the Honorable J. M. Bartholomew, chief justice of the supreme court of the State of North Dakota, this 10th day of January, in the year of our Lord one thousand eight hundred and ninety-nine.

J. M. BARTHOLOMEW,
Chief Justice of the Supreme Court of North Dakota.

Due service of the above citation is hereby admitted this 17th day of January, A. D. 1899.

JAMES B. KERR,
BALL, WATSON & MACLAY,
Attorneys for Defendants in Error.

Filed Jan. 23, 1899.

R. D. HOSKINS, *Clerk.*

1 STATE OF NORTH DAKOTA, *ss:*

In the Supreme Court.

I, R. D. Hoskins, clerk of the supreme court of the State of North Dakota, in pursuance to the foregoing writ of error, do hereby certify that on the 19th day of March, 1898, there was filed in said office a record on appeal from the district court of the county of Sargent, in the State of North Dakota, wherein Fred Hewitt was respondent and Emil Schultz and Friederika Schultz were appellants; which record was in words and figures as follows, to wit:

2 STATE OF NORTH DAKOTA, } *ss:*
County of Sargent, }

District Court, Fourth Judicial District.

FRED HEWITT, Plaintiff,
against
EMIL SCHULTZ and FRIEDERIKA SCHULTZ, Defendants.

The State of North Dakota to the above-named defendants:

You are hereby summoned and required to answer the complaint of the plaintiff in the above-entitled action, of which a copy is hereunto annexed and herewith served upon you, and to serve a copy of your answer to the said complaint on the subscriber, at his office, in the city of Lisbon, in said county and State, within thirty days after the service of this summons upon you, exclusive of the day of such service, and if you fail to answer the said complaint within the time aforesaid the plaintiff in this action will apply to the court for the relief demanded in the complaint.

Dated July 10th, 1895.

THOMAS A. CURTIS,
Plaintiff's Attorney, Lisbon, North Dakota.

3 STATE OF NORTH DAKOTA, } ss:
County of Sargent, }

In District Court, Fourth Judicial District.

FRED HEWITT, Plaintiff, }
vs.
EMIL SCHULTZ and FREDERIKA SCHULTZ, Defendants. }

The plaintiff complains and alleges:

I.

That on the 10th day of July, 1882, plaintiff was possessed and ever since the 28th day of March, 1883, has been the owner in fee-simple and possessed and entitled to the possession of that certain tract of land, situated, lying, and being in the county of Sargent and the State of North Dakota, described as follows, to wit:

The northeast quarter (N. E. ¼) of section numbered thirteen (13), in township numbered one hundred thirty-two (132) north of range numbered fifty-seven (57) west of the 5th principal meridian.

II.

That while the plaintiff was so seized the defendants, afterwards and on or about the 18th day of December, 1889, and without right or title, unlawfully entered into possession of said demanded premises and ousted and ejected plaintiff therefrom, and now unlawfully with-old the possession thereof from this plaintiff, to his damage in the sum of three hundred dollars ($300.00).

III.

That the value of the rents, issues, and profits of said premises from the said 18th day of December, 1889, and while the plaintiff has been so excluded therefrom by the defendants, is the sum of seven hundred fifty dollars ($750.00).

IV.

That plaintiff has demanded and caused to be demanded
4 of defendant the possession of said premises previous to the commencement of this action.

Wherefore the plaintiff prays judgment against defendants:

1. For the recovery of the possession of the said premises and for the sum of three hundred dollars ($300.00) damages for withholding the possession thereof.

2. For the sum of seven hundred fifty dollars ($750), the value of said rents, issues, and profits.

3. For the costs and disbursements of this action.

Dated Lisbon, N. D., July 10, 1895.

(Signed) THOMAS A. CURTIS,
Plaintiff's Attorney, Lisbon, N. D.

5 STATE OF NORTH DAKOTA, } ss:
County of Sargent, }

In District Court, Fourth Judicial District.

FRED HEWITT, Plaintiff, }
vs.
EMIL SCHULTZ and FREDERIKA SCHULTZ, Defendants. }

Answer.

The defendants, answering unto the matters and things set forth and alleged in the plaintiff's complaint herein, allege and aver as follows:

First. They deny each and every allegation in the first, second, and third paragraphs of the plaintiff's complaint herein, except that the said defendants admit that they are now in possession of said described land.

And for a further answer unto the matters and things set forth and charged in the plaintiff's complaint, and as an equitable defense and counter-claim thereunto, the said defendants allege and aver as follows, to wit:

1. That the Northern Pacific Railroad Company is a corporation created, organized, and existing under and by virtue of an act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound, on the Pacific coast, by the northern route," and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

That by the terms and provisions of said act said corporation was authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, beginning at a point on Lake Superior
6 in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route as should be determined by said company within the territory of the United States, on a line north of the 45th degree of latitude, to some point on Puget's sound, with a branch, via the valley of the Columbia river, to a point at or near Portland, in the State of Oregon.

By the third section of said act lands were granted to said railroad company as follows:

"That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, * * * every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved,

sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of the said sections or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. * * *

"Provided further, that all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road, may be selected as above provided: And provided further, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal."

By section 4 of said act it was further provided that whenever said company should have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated the President of the United States should appoint three commissioners to examine the same, and if it should appear that such twenty-five consecutive miles of said road and telegraph line had been completed in a good, substantial, and workmanlike manner, as in all other respects required by said act, the commissioners should so report to the President of the United States, and patents of lands, as aforesaid, should be issued to said company confirming to said company the right and title to said lands situated opposite to and conterminous with said completed sections of said road, and that whenever from time to time twenty-five additional consecutive miles should have been constructed, completed, and in readiness, as aforesaid, and verified by said commissioners to the President of the United States, then patents should be issued to said company conveying the additional sections of land, as aforesaid, and so on as fast as every twenty-five miles of said road should be so completed.

By section 6 of said act it was further provided that the President of the United States should cause the land to be surveyed for forty miles in width on both sides of the entire line of said road after the general route thereof was fixed and as fast as might be required by the construction of said road, and that the odd-numbered sections of land thereby granted should not be liable to sale or entry or pre-emption before or after they were surveyed except by said company.

2. That within two years after the passage of said act the said railroad company duly accepted the terms, conditions, and impositions thereof in writing under its corporate seal, executed pursuant to the directions of its board of directors first had and obtained, and on December 29, 1864, served such acceptance on the President of the United States.

3. That thereafter, by a joint resolution approved May 31, 1870,

entitled "A resolution of Congress authorizing the Northern Pacific Railroad Company to issue bonds for the construction of its road and to secure the same by mortgages, and for other purposes," it was resolved and provided that, in the event of there not being in any State or Territory in which said main line or branch might be located at the time of the final location thereof the amount of lands granted by said act to said company within the limits prescribed by its charter, the said company should be entitled, under the direction of the Secretary of the Interior, to receive so many sections of land belonging to the United States and designated by odd numbers in such State or Territory within ten (10) miles on each side of said road beyond the limits prescribed in said charter as would make up the deficiency on said main line or branch (except mineral or other lands as excepted in the charter of said company by said act of Congress approved July 2, 1864) to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of said act of July 2, 1864.

4. That said railroad company duly proceeded with the work of surveying and definitely locating the line of its said railroad; that prior to May 24, 1873, the said company had definitely located that portion of the line of its said railroad extending from the
9 Red River of the North to the Missouri river, in the Territory of Dakota, now State of North Dakota; that on the 24th day of May, 1873, the said company transmitted a map of that portion of its said line of railroad so definitely located to the Secretary of the Interior, and that on May 26th, 1873, the Secretary of the Interior transmitted said map to the Commissioner of the General Land Office with the following letter, to wit:

"DEPARTMENT OF THE INTERIOR,
"WASHINGTON, D. C., 26 *May*, 1873.

"SIR: I transmit herewith for appropriate actions map of the definite location of the Dakota division of the Northern Pacific railroad between the Red and Missouri rivers, received on the 24th instant, with letter of same date from W. K. Mendenhall, Esq., att'y for the Co. in this city.

"Very respectfully, your ob't servant,
"C. DELANO, *Secretary.*

"Hon. Willis Drummond, Com'r G. L. O."

That on the same day, to wit, May 26, 1873, said map was duly filed in the office of the Commissioner of the General Land Office; that upon the filing of said map or plat the said Commissioner made and designated upon the maps and records of his said office the limits of the lands granted by Congress to said railroad company to aid in the construction of the said railroad coterminous with said line, as shown on said plat, namely, forty (40) and fifty (50) the mile limits on each side of said line of definite location, the first named being the lands in place, and hereafter, for the purpose of

convenience, being designated the place lands, the second being the limits of the indemnity provided for in the act of Congress approved July 2, 1864, hereafter, for convenience, designated the indemnity lands. Thereafter the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, transmitted to the United States district land officers for the district through which the said line of definite location extended and within which such place and indemnity lands fell, a diagram showing that portion of the line of said railroad so definitely fixed, as aforesaid, with the place and indemnity limits indicated thereon, and transmitted with said diagram the following letter of instructions, to wit:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *June 11th*, 1873.

"Register and receiver, Pembina, D. T.

"GENTLEMEN: The Northern Pacific Railroad Company filed in this office on the 26 ultimo, in accordance with the law, a map of the definite location of their road from the Red River of the North to the Missouri river, in Dakota Ty. I have accordingly prepared a diagram, which is herewith transmitted, showing the forty and fifty mile limits of their land grant along said line, with also the forty-mile limits of withdrawal ordered by my letter to you of March 30, 1872, upon a designated line, and you are hereby directed to withhold from sale or entry all the odd-numbered sections, both surveyed and unsurveyed, falling within those limits, and to hold subject to pre-emption and homestead entry only the even-numbered sections at $2.50 per acre within the forty-mile limits and $1.25 per acre between the forty and fifty mile or indemnity limits.

"The even-numbered sections within the forty-mile limits of former withdrawal now falling without the present corrected limits will be reduced in price to $1.25 per acre.

"The right of the road attached to both surveyed and unsurveyed lands from the date of filing the map of definite location in this office, to wit, May 26, 1873, from which date also the even sections become double minimum.

"Be pleased to acknowledge the date of the receipt of this letter.

"Very respectfully, W. W. CURTIS,
Acting Commissioner."

That said letter and diagram were duly received and filed in the said district land office at Pembina, that being the district in which said lands were situate, June 24, 1873.

The said northeast quarter (N. E. ¼) of section thirteen (13), in township one hundred and thirty-two (132) north of range fifty-seven (57) west of the fifth (5th) principal meridian, North Dakota, was coterminous with said line of definite location so fixed May 26th, 1873, as aforesaid, and was more than forty (40), but within fifty (50), miles thereof, being within the indemnity limits, and was at the date of said grant, at the time said line was definitely fixed and

the plat thereof filed in the office of the Commissioner of the General Land Office, and at the time said order of withdrawal was made, and at the time it was received at the said United States district land office at Pembina, and at all times herein mentioned except as otherwise in this answer set forth, public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption and other claims or rights, and was and is non-mineral in character; and defendants further aver that the said land was from and after the definite location of said line of railroad coterminous therewith, and from and after said order of withdrawal was made reserved from sale or location, homestead or pre-emption entry except by said railroad company.

5. That prior to the year 1885 said Northern Pacific Railroad Company definitely located the line of its said railroad from a point on Lake Superior, in the State of Wisconsin, westerly through the State of Minnesota and the Territories of Dakota, Montana, Idaho, and Washington to Wallula junction, in said Washington, and
12 from Portland, Oregon, to a point on Puget sound, at Tacoma, Washington, and definitely located the branch line of its said railroad from Pasco junction, a point on the said main line in Washington, across the Cascade mountains to said Tacoma, and from time to time, as portions of said main line and branch line were definitely located, duly approved by the Secretary of the Interior, — to be filed in the office of the Commissioner of the General Land Office; that each and every portion of said main line and branch was so definitely fixed and plats thereof filed in the office of the Commissioner of the General Land Office prior to January 1, 1885; that upon the filing of said maps or plats of the line of the railroad so definitely fixed in the office of the Commissioner of the General Land Office the said Commissioner made and designated upon the maps and records of his office the limits of the land granted by the said Congress to said railroad company as defined by said lines of definite location as follows: Coterminous with the portions of said line located in the then Territories of (now States of) North Dakota, Montana, Idaho, and Washington, the forty and fifty mile or place and first indemnity limits; coterminous with the portions of said line located in the State of Oregon, the twenty and thirty mile or place and first indemnity limits; coterminous with the portions of said line in the States of Minnesota and Wisconsin, the twenty, thirty, and forty mile or place, first and second indemnity limits, said second indemnity limits being the limits provided for in said joint resolution approved May 31, 1870; that from time to time, as such limits were so designated and fixed, the said Commissioner, under the directions of the Secretary of the Interior, withdrew the odd-numbered sections of public lands therein from sale or location, pre-emption, or homestead entry.

6. That, as defendants are informed and believe, there were at the time said plats of definite location of said line
13 were filed in the office of the Commissioner of the General Land Office, as aforesaid, over twenty-four millions of acres of unsurveyed land within the limits prescribed in said act of July

2, 1864, and included within what, when surveyed, would be odd-numbered sections, and that the greater portion thereof still remains so unsurveyed; that portions of said lands within the place limits of said grant, both surveyed and unsurveyed, are mineral lands; that other large portions thereof were at the date of the grant, or at the time the line of said railroad coterminous therewith *were* definitely fixed and plats thereof filed in the office of the Commissioner of the General Land Office (and many thereof still are), included within the Indian and military reservations; that still other vast quantities of said lands were at said times and are reserved, sold, granted, and otherwise appropriated or had and have attached thereto pre-emption or other claims or rights, and that when the entire line of said railroad was definitely fixed and the plats thereof filed in the office of the Commissioner of the General Land Office there was not, has not since been, and is not now, within the said indemnity limits prescribed in said act of Congress approved July 2, 1864, sufficient lands, subject to said railroad company's right of selection, to make up to said company the quantity of lands within the place limits of its said grant which are mineral and which were reserved, sold, granted, and otherwise appropriated and to which pre-emption or other claims or rights had attached at the date of the grant or at the time the line of said road opposite thereto was definitely fixed and the plat thereof filed in the office of the Commissioner of the General Land Office and in lieu of which said company was entitled to obtain other lands or to make up, together with the lands in the place limits, the quantity of lands granted to said company by said act of July 2, 1864; and defendants
14 further aver upon information and belief that if said railroad company had received and should receive all the lands in said indemnity limits subject to its right of selection that said lands would lack over three million acres of being sufficient to indemnify said company for the lands within the place limits excepted from its said grant in lieu of which it was and is authorized to obtain lands within said indemnity limits.

7. That said Northern Pacific Railroad Company duly constructed and completed that portion of its said railroad and telegraph line on, over, and along said line of definite location extending from Lake Superior to Puget sound, as aforesaid (both main and branch lines), in all respects as a first-class railroad and telegraph line; that as fast as portions of said railroad and telegraph lines equal or exceeding twenty-five (25) miles in length were so constructed, as aforesaid, they were examined by commissioners appointed by the President of the United States, and by said commissioners were found and reported to have been constructed in a good, substantial, and workmanlike manner, in all respects as required by said act of Congress; that such reports were duly accepted and approved by the President of the United States, as provided in said act of Congress of July 2, 1864.

That the portion of said railroad and telegraph line extending on, over, and along said line of definite location from the Red River of the North to the Missouri river was so completed prior to No-

vember, 1873; that the President of the United States having appointed three commissioners to examine the same, the said commissioners so examined it, and on the 24th day of November, 1873, reported to the Secretary of the Interior that said portion of the said railroad and telegraph line had been constructed in a good, substantial, and workmanlike manner, in all respects as required by the act of Congress; that thereafter, to wit, November 28, 1873, the said Secretary of the Interior transmitted said report to the President of the United States with the following recommendation: "The commissioners in their report represent that this portion of the road has been (in the main) constructed in a first-class manner. I would therefore recommend the acceptance of the same and the issuance to the company of patents for lands due on account of the completion thereof." That said report was accepted and said recommendations approved by the President of the United States December 1, 1873.

8. On May 17, 1883, in response to a letter from the Commissioner of the General Land Office stating as follows:

"That it has been the uniform practice as to all grants having indemnity provisions, including that of the Northern Pacific railroad, to withdraw from entry and sale the indemnity as well as the granted lands. It has been the rule, where the maps showing the definite location of a road have been presented to the department, to refer the same to this office without comment for appropriate action, * * * and the withdrawals have followed as a matter of course and without specific authority from the department."

And asking instructions upon the following points, to wit:

"Whether I shall direct the local officers to withdraw from entry and settlement the odd sections within the indemnity limits of the Northern Pacific railroad, or whether I shall only mark the outer lines of said indemnity limits, beyond which the railroad company cannot go, and hold the lands in such limits open to the first legal applicant."

The Secretary of the Interior ruled, among other things, as follows:

"The grant to the Northern Pacific does not provide, either specifically or in general terms, for an executive withdrawal of lands within either granted or indemnity limits.

"The power of the executive department of the Government, however, to withdraw lands for the benefit of the grant, within the granted limits, without any direction expressed in the act, is now too well settled to be questioned (8 Att'y Gen'l Opin., 244; Wolcott *vs.* Des Moines, 5 Wall., 681; Woolsey *vs.* Chapman, 101 U. S., 755).

"Such power has been recognized by Congress (10 Stat., 269) and has been exercised by the Land Department for a long time before the Northern Pacific act was passed, and must have been well understood by Congress at the time of the passage of that act.

"This department has held that it had such authority in the case of the Northern Pacific grant (Copp's P. L. L., 377).

"The object of the withdrawal is to prevent private appropria-

tion of the granted lands, which would defeat the object of the grant (5 Wall., 688, *supra*). By parity of reasoning the authority to withdraw lands within the indemnity limits must follow. Such authority has been repeatedly exercised by the Land Department in reference to the Northern Pacific and other indemnity lands. * * *

"I am convinced that the persuasive force of the acts passed for the Northern Pacific require such withdrawal to be made as will place beyond reasonable doubt any possibility of the miscarriage of their evident intent with respect to its lands.

"The intention of the legislature, as manifest in these land-grant acts, must in good faith be carried out by the Land Department. * * *

"It was clearly the intention of the legislature that within the indemnity limits fixed by the Northern Pacific acts the
17 company should have the opportunity to take lands, acre for acre, for all those lost in place.

"A considerable portion of the road has already been built, the remainder is in rapid progress of construction, and the entire road will probably be completed at an early day. The work of ascertaining what lands have been lost to the company ought to go forward as rapidly as possible, and the company be enjoined to make selections in lieu of such lost lands without delay.

"In reply to your suggestion whether 'the withdrawals in the indemnity limits of this grant are to stand as far as made,' I have to say that I am of the opinion that such withdrawals should, at least for the present, be maintained.

"I am further of the opinion that, upon filing maps of approved definite location, withdrawals of lands within indemnity limits should be made by you to the extent of the first indemnity limits. Such action will be in accord with the practice heretofore pursued by your office under the grant in question."

And for greater particularity defendants beg leave to refer to the full text of said decision as published in the third volume of the Decisions of the Department of the Interior Relating to Public Lands, beginning at page 511 thereof.

And defendants allege and aver that by the decisions of the Secretary of the Interior in making the orders of withdrawal hereinbefore set out, and by the said decisions last referred to, the question of the right and authority of the Secretary of the Interior to so withdraw and reserve the lands within the limits of said Northern Pacific Railroad grant was finally determined and adjudicated, and such question became and was in the Interior Department of the United State *res adjudicata*, and was not subject to review by, but was and is binding upon the successors of the said officers of the In-
18 terior Department and their subordinates.

That thereafter, to wit, May 26, 1883, the Commissioner of the General Land Office, under the said direction of the Secretary of the Interior, issued to the registers and receivers of the United States district land offices for the land districts with- which the lands coterminous with the Northern Pacific line and within the limits

of its grant were located a circular of instructions, in which, among other things, he directed said district land officers as follows:

"The Secretary's decision being applicable to all withdrawals for indemnity purposes under railroad grants, you are directed to refuse applications for land thus withdrawn, except where the applicant alleges settlement prior to the date of the receipt of the order of withdrawal at the local office." That said circular of instructions was received in due course of mail at the United States district land office at Fargo, North Dakota, that being the district in which the said northeast quarter (N. E. ¼) of section thirteen (13), in township one hundred and thirty-two (132) north of range fifty-seven (57) west of the fifth principal meridian, was then and at all times since has been situated; that on May 28th, 1883, the Secretary of the Interior issued the following instructions to the Commissioner of the General Land Office:

"SIR: It is my desire to open for settlement as speedily as possible all the lands within the indemnity limits of the grant to the Northern Pacific Railroad Company not actually required to supply the lands lost in place within the granted limits. The grant should be adjusted at the earliest possible time that the orders of withdrawal may be vacated without unreasonable delay, as indicated in my letter of the 17th inst. The unparalleled demand for lands for actual settlement by great numbers of persons, not only from
19 foreign countries, but from the older States, seeking homes, under the settlement laws, along the line in the vicinity of the Northern Pacific grant, requires, for the best interests of the country and for all parties concerned, that the withdrawals should not be maintained any longer than is actually necessary for the adjustment of the guaranteed rights of the company. In order to facilitate the work of making selections, I think you should instruct the land officers that when clear lists of selections free from conflict or other objection are filed with the district officers and approved by them, said selection should at once be marked upon their books and forwarded for final examination, leaving the ascertainment of lands lost in place to your office instead of requiring preliminary lists of such lost lands, together with the indemnity lands, tract for tract, from the company as heretofore. I am satisfied that the work of adjusting the grants will go forward much more rapidly under this plan than under the former practice.

"Very respectfully, H. M. TELLER, *Sec.*"

And thereafter the said Commissioner of the General Land Office duly instructed the registers and receivers of the United States district land offices as required by said Secretary's letter of May 28, 1883.

9. Defendants further allege and aver that in the spring of 1883 the said Northern Pacific Railroad Company, by its duly authorized agent, prepared a list of lands within its indemnity limits coterminous with the portion of its said line extending from the Red River of the North to the Missouri river, and duly applied to select said lands as indemnity in lieu of lands excluded from its grant and for

which it was entitled to take indemnity by tendering said list, together with all fees prescribed by law and the regulations of the Interior Department, to the register and receiver of the United
20 States district land office for the district of lands for sale at Fargo, Dakota Territory, that being the district in which the lands in said list were situated; that among other lands described in said list was the said northeast quarter (N. E. ¼) of section thirteen (13), in township one hundred and thirty-two (132) north of range fifty-seven (57) west of the fifth principal meridian, Territory of Dakota, now State of North Dakota; that said list was due and regular in form, complying therein with the directions of the Secretary of the Interior; that on April 9th, 1883, said list was accepted and filed by the register and receiver of said United States district land office at Fargo, Dakota Territory, who, pursuant to the directions of the Secretary of the Interior, indorsed thereon their certificate of acceptance of approval in the words and figures following, to wit:

"UNITED STATES LAND OFFICE,
"FARGO, DAKOTA, *April 9th*, 1883.

"We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Northern Pacific Railroad Company under the grant to said company by acts of Congress approved July 2, 1864, and joint resolution approved May 31, 1870, and selected by said Northern Pacific Railroad Company by Charles B. Lamborn, the duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct, and we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States and within the limit of fifty miles on each side, and that the same are not nor is any part thereof returned and denominated as mineral lands nor claimed as swamp lands, nor is there any homestead, pre-emption, State, or other valid claim to any portion of said lands on file and of record in this office.

"We further certify that the foregoing list shows an as-
21 sessment of the fees payable to us allowed by the act of Congress approved July —, 1864, and contemplated by the circular of instructions dated January 24, 1867, addressed by the Commissioner of the General Land Office to the registers and receivers of the general land offices, and that the said company have paid to the receiver on March 19, 1883, the full sum of $5,487.29 in full payment and discharge of said fees.

"HORACE AUSTIN, *Register*.
"E. C. GEAREY, *Receiver*."

That the aggregate area of the lands described in said list was four hundred and thirty-eight thousand nine hundred and ninety-one and ninety one-hundredths (438,991.90) acres.

That the losses in lieu of which said railroad company applied to select the lands described in said list were not nor was any thereof designated and set forth in said list.

That after the filing of said list it was, in accordance with the rules of practice of the Interior Department, transmitted to the office of the Commissioner of the General Land Office for examination and approval.

That after the filing of said selection list, as hereinbefore set forth, to wit, August 4, 1885, the Commissioner of the General Land Office, acting under the instructions of the Secretary of the Interior, issued the following circular of instructions governing the manner of making indemnity selections:

"Railroad indemnity selections.

"*Circular.*

"Acting Commissioner Walker to registers and receivers.

"AUGUST 4, 1885.

"Before admitting railroad indemnity selections in any case you will require preliminary lists to be filed specifying the particular deficiencies for which indemnity is claimed. You will then
22 carefully examine your records, tract by tract, to ascertain whether the loss actually exists as alleged. You will admit no indemnity selections without a proper basis therefor. If you are in doubt whether the company is entitled to indemnity for losses claimed, you will transmit the preliminary lists to this office for instructions and not place the selections upon record until directed so to do.

"Where indemnity selections have heretofore been made without specifications of losses, you will require the companies to designate the deficiencies for which such indemnity is to be applied before further selections are allowed.

"The selection agent applying to make indemnity selections must state in his affidavit attached to the list presented that the specific losses for which indemnity is claimed are truly set forth and described in said list, and that said losses have not heretofore been indemnified in any manner.

"Where deficiencies exist, for which indemnity is allowed by law, the lieu selections must be made from vacant unappropriated lands within proper sections and limits nearest the granted sections in which the loss occurred. You will be careful to see that this rule is strictly complied with, and will reject all selections not made in conformity thereto.

"Approved:

"L. Q. C. LAMAR, *Secretary.*"

The said circular had no application to grants where the indemnity lands were not sufficient in quantity to indemnify the losses, as was the case with the Northern Pacific grant.

That, Aug. 15, 1887, the Secretary of the Interior, after finding and reporting to the President of the United States that there was not sufficient indemnity lands subject to said railroad company's right of selection in the States of Wisconsin and Minnesota to in-

demnify it for losses from its grant in said States, and after
23 refusing to ascertain and determine whether or not there were sufficient lands within the entire indemnity limits of the said Northern Pacific Railroad Company's grant to indemnify it for all losses from its said grant, made an order attempting and purporting to revoke all the withdrawals of indemnity lands made for the benefit of your petitioner. Said order provided, among other things, as follows:

"As to the lands covered by unapproved selections, applications to make filings and entries thereon may be received, noted, and held subject to the claim of the company, of which claim the applicant must be distinctly informed and memoranda thereof entered upon his papers whenever such application to file or enter is presented alleging upon sufficient *prima facie* showing that the land is from any cause not subject to the company's right of selection, notice thereof will be given to the proper representative of the company, which will be allowed thirty days after service of said notice within which to present objections to the allowance of such filing or entry. Should the company fail to respond or show cause before the local officers why the application should not be allowed, said application for filing or entry will be admitted and the selection held for cancellation; but should the company appear and show cause, an investigation will be ordered under the rule of practice to determine whether said land is subject to the right of the company to make selection of the same, which shall be determined by the register and receiver subject to the right of appeal in either party."

The defendants allege and aver that said order purporting to revoke said withdrawals and to leave the lands within the indemnity limits of said railroad company's grant subject to entry by settlers under the public land laws of the United States was made without
authority; that by reason of the deficiency in said railroad
24 company's grant, all of the vacant indemnity lands within the indemnity limits were appropriated for the benefit of said railroad company, and there was no necessity for the exercise of the judgment of the department in selecting from said indemnity lands, and said lands were, by virtue of said act of Congress approved July 2, 1864, and said joint resolution of May 31, 1870, reserved and appropriated for the benefit of said Northern Pacific Railroad Company; that the said Secretary further directed in his said order last above referred to that no filings or entries of the lands embraced therein should be received until after giving notice of the same by public advertisement for the period of thirty days; that according to the terms of said order the lands included within the Fargo land district, in Dakota Territory, were not subject to be filed upon or entered prior to October 15, 1887, that being the expiration of the thirty days' published notice.

12. That, October 12, 1887, the said Northern Pacific Railroad Company, for the purpose of complying with the terms and provisions of said circular of August 4, 1885, hereinbefore set forth, although said circular was not applicable to said grant, filed in the United States district land office at Fargo, North Dakota, a certain

list wherein it designated the losses in lieu of which it had applied to select lands described in its said selection list filed April 9, 1883, as hereinbefore set forth; that Exhibit "A" hereunto attached is a true and correct copy of said list as filed, omitting therefrom many of the land descriptions; that the 7,900.78 acres included in said list filed April 9, 1883, but marked as "stricken out" in said list filed October 12, 1887, were included in a certain other supplemental list filed in said United States district land office at Fargo, October 12, 1887, in connection with a list of losses in lieu of which said lands were selected; that the said lands designated as lost lands in said Fargo list No. 6, filed
25 October 12, 1887, as hereinbefore set forth, were lands coterminous with the line of said Northern Pacific Railroad Company and within the place limits of the grant thereto; that many of said losses were situate in States other than Dakota; that said lands and each and all thereof were reserved, sold, granted, and otherwise appropriated or had attached thereto pre-emptions or other claims or rights at the time the line of said Northern Pacific railroad coterminous therewith was definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office, and was thereby excluded from the grant to said Northern Pacific Railroad Company, and said company became entitled to indemnity therefor; that the said list of losses filed October 12, 1887, as aforesaid, was prepared in the manner and form required by the instructions of the Secretary of the Interior, and selection list prepared in such manner and form were repeatedly approved by the Secretary of the Interior; that since the filing of said lists, to wit, March 30, 1891, the Secretary of the Interior approved for patent 283,125.95 acres of the lands selected, as aforesaid, in said Fargo list No. 6, and in lieu of 283,110 & $\frac{87}{100}$ acres of the losses designated October 12, 1887, in said Fargo list No. 6, as aforesaid, and thereafter, to wit, on the — of ——, 1891, said lands were duly conveyed to said Northern Pacific Railroad Company by letters patent issued under the great seal of the United States.

13. That afterwards, to wit, July 1, 1890, the Secretary of the Interior, in a certain contest pending before the Department of the Interior between the Northern Pacific Railroad Company and John O. Miller, held and determined as follows:

"The claim of the Northern Pacific Railroad Company to a right to select the tract involved is based upon the third section of
26 its granting act (July 2, 1864, 13 Stats., 365), which provides that whenever prior to the definite location of its line of road any of said (granted) sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected in lieu thereof under the direction of the Secretary of the Interior in alternate sections and designated by odd numbers not more than ten miles beyond the limits of said (granted) alternate sections.

"The loss to its grant in the manner prescribed of a tract or tracts of land corresponding to those which it claims as indemnity is, under

the stated provisions of its grant, an essential to the right of the company to so select.

"That such losses should first be shown to the satisfaction of the Land Department is obvious, for otherwise the indemnity claimed therefor could not properly be selected under the 'direction of the Secretary of the Interior,' or, in other words, in accordance with the act of 1864, *supra*.

"By circular approved August 4, 1885 (4 L. D., 90), the various local officers were instructed as follows:

"'Before admitting railroad indemnity selections in any case you will require preliminary lists to be filed, specifying the particular deficiencies for which indemnity is claimed, and in cases where indemnity selections have heretofore been made without specification of losses you will require the companies to designate the deficiencies for which such indemnity is to be applied before further selections are allowed.'

"The particular loss in lieu of which the Northern Pacific Railroad Company seeks to select the land in question is not shown by the record before me, and I am advised by your office that it has failed to designate the same.

"The said application of the Northern Pacific railroad is accordingly denied."

27 That thereafter, the said Northern Pacific Railroad Company having duly moved for a review of said last above mentioned decision, the said Secretary of the Interior reaffirmed the same and, among other things, held as follows, to wit: "The selection in this instance is not, in my opinion, protected by the order of May 28, 1883, as that order did not contemplate the selection of lands subject to settlement by merely listing the lands without designating the basis, but was intended to be applicable only to such lands as were protected by the withdrawal;" and for the full text of both of said decisions defendants ask leave to refer to the same as printed in volume 11 of the Decisions of the Department of the Interior Relating to the Public Lands, beginning on pages 1 and 428 of said volume respectively; that thereafter the said Secretary of the Interior held and determined that lands which were covered by the executive orders of withdrawal of indemnity land, as was the land here in question, were within the terms of Secretary Teller's order of May 28, 1883, and that no designation of losses was essential to a valid selection of such lands; that the said Northern Pacific Railroad Company, for the purpose of complying with the interpretation placed by the Secretary of the Interior in said last-named decisions in said John O. Miller case upon the circulars of instructions governing the selection of indemnity lands, rearranged the lands theretofore selected in said Fargo indemnity list No. 6 and remaining unpatented and rearranged the losses designated as a basis for the selection of said lands so that said rearranged list would show the specific loss in lieu of which each individual tract of land selected in said list was so selected, and attached to said list a statement in which, after reciting the said previous selection of said lands, the said company set forth and stated as follows, to

wit: "Now, therefore, to comply with the further require-
28 ments of the Interior Department, but not waiving or abandoning any rights or claims heretofore acquired by virtue of its selections heretofore made under the directions of the Secretary of the Interior, the said Northern Pacific Railroad Company has herein designated the lands heretofore selected as indemnity in said Fargo list No. 6, and no other lands, and has herein set opposite each specific description of land so selected the description of the land lost from its grant in place and in lieu of which such indemnity land is selected;" and thereafter, to wit, February 18, 1892, the said railroad company duly filed said rearranged list in the said United States district land office at Fargo, North Dakota; that among the lands described in said rearranged list and which had been described and selected in said list theretofore filed as aforesaid was the northeast quarter (N. E. ¼) of section thirteen (13), township one hundred and thirty-two (132) north of range fifty-seven (57) west of the fifth principal meridian, North Dakota; that said land, as appeared from said rearranged list, was selected in lieu of the southeast quarter (S. E. ¼) of section twenty-one (21), township forty-four (44) north of range nine (9) west of the fourth principal meridian, Wisconsin, which said land was coterminous with and within twenty miles of the portion of the line of said Northern Pacific railroad, as definitely fixed, extending through the State of Wisconsin, and was at the date of the grant to said Northern Pacific railroad and at the time the line of said railroad coterminous therewith was definitely fixed and the plat thereof filed in the office of the Commissioner of the General Land Office aforesaid reserved for and appropriated by the United States to aid in the construction of a certain line of railroad under the provisions of the act of Congress approved July 3, 1856, entitled "An act granting public
lands to the State of Wisconsin to aid in the construction
29 of railroads in said State;" that said land was, because of such reservation and appropriation, excluded from the grant to said Northern Pacific Railroad Company, and said company was then and there entitled to take indemnity in lieu thereof; that after said rearranged list was so filed, as aforesaid, the said register and receiver transmitted the same to the Commissioner of the General Land Office for examination and approval; that, October 14, 1893, the Secretary of the Interior instructed the Commissioner of the General Land Office as follows, to wit: "I have therefore to direct that you call upon all railroad companies having pending indemnity selections to revise their lists within six months from the date of your order, so that a proper basis will be shown for each and all lands now claimed as indemnity, the same to be arranged, tract for tract, in accordance with departmental requirements, and that all tracts formerly claimed, for which a particular basis has not been assigned in the manner prescribed at the expiration of said six months, be disposed of under the terms of the orders restoring indemnity without regard to such previous claim."

That thereafter, to wit, January —, 1894, the Commissioner of the General Land Office called upon said Northern Pacific Railroad

Company, in accordance with such instruction, to revise its indemnity selection lists; that previous to the expiration of six months from the service of said order upon said railroad company all its indemnity selection lists were so revised as to comply with the instructions of the Secretary of the Interior.

14. That, November 2, 1882, the plaintiff, Fred Hewitt, filed a certain paper, purporting to be declaratory statement No. 11747, in the United States district land office at Fargo, North Dakota, wherein and whereby he alleged that he had settled upon the north-
30 east quarter (N. E. ¼) of section thirteen (13), township one hundred and thirty-two (132) north of range fifty-seven (57) west, Dakota, April 10, 1882, and declared his intention to enter the said described land under the provisions of the act of Congress approved September 4, 1841, and the acts supplemental thereto and amendatory thereof, authorizing the entry and purchase of public lands of the United States *and* those who have declared their intention to become such citizens; that thereafter, to wit, April 4, 1883, the said plaintiff appeared at the said United States district land office and tendered his final proof showing compliance with the provisions of said acts of Congress entitling him to enter the said described lands and tendered the purchase price thereof; that said final proof was then and there rejected by the register and receiver of the said United States district land office for the reason that said land had been withdrawn for the benefit of the Northern Pacific Railroad Company and was not subject to entry under the provisions of said act of September 4, 1841, and acts of Congress supplemental thereto and amendatory thereof; that thereafter the said Hewitt appealed from said action by the register and receiver of the United States district land office at Fargo, North Dakota, to the Commissioner of the General Land Office, who, on the 5th day of October, 1883, affirmed the said decision of said register and receiver. The said Hewitt did not take at said time any further action with reference to said matter, and did not appeal to the Secretary of the Interior, but thereafter abandoned said land. —— —, 1888, the said Hewitt applied to the Commissioner of the General Land Office for a review of said decision of October 5, 1883, claiming and pretending that he had never received any notice of said decision of the Commissioner of the General Land Office; that, September 25, 1888, the Commissioner of the General Land Office granted
31 said application and rendered his certain decision, which is in the words and figures following, to wit:

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Sept.* 25, 1888.

"Register and receiver, Fargo, Dakota.

"GENTLEMEN: I have considered the application of Fred Hewitt for a review of office decision of Oct. 5, 1883, affirming your action in rejecting his final proof for N. E. ¼, section 13, town 132 N., range 57 W.

"Said tract is within the 50-mile indemnity limit of the with-

drawal for the benefit of the Northern Pacific R. R. Co. ordered by letter from this office dated June 11, 1873, received at the local office, then at Pembina, June 24, 1873. The township was surveyed July 12 to 27, 1882, and the plat of survey was filed in your office on the 13th of October following. The whole of said section was selected by the agent of the railroad company.

"Mar. 19, 1883, per list No. 6.

"The records here show that Hewitt presented his final pre-emption proof at your office; which was rejected for conflict with the withdrawal and selection above recited, and from this action Hewitt appealed.

"Your decision was confirmed by this office as being in accordance with the instructions contained in the circular approved May 26, 1883.

"Hewitt asks for a review of the above decision on the ground that he never received any notice thereof until recently informed by an attorney at Washington.

"The final proof submitted by applicant shows that he is a native-born citizen, over 21 years of age, and a qualified pre-emptor July 10, 1882. His improvements consisted of a frame house, 16 x 16 feet; stable, 10 x 12 feet, and 20 acres of ground broken, the
32 value of the same being estimated at $350. This declaratory statement was presented for filing within the time prescribed by law and accepted by your office, a receipt issuing therefor.

"Under the late decision of the Hon. Secretary of the Interior, in the case of The Northern Pacific R. R. Co. *vs.* Guilford Miller, it is held that the withdrawal of indemnity lands for the benefit of said company was prohibited by the 6th section of the granting act, and, being in violation of law and without effect, was not operative to defeat the rights of *bona fide* adverse claimants under the general laws of the United States who settled on lands within such limits prior to the time when selection by the railroad company had been made.

"In view of the fact that claimant established his actual residence and had permanent improvements upon the land prior to the Government survey or selection by the railroad company his claim was superior thereto, and hence office decision of October 5, 1883, is set aside, Hewitt's final proof admitted, and the selection by the railroad company held for cancellation.

"Advise all parties in interest promptly of this decision, and that 60 days will be allowed for appeal.

"The resident attorney for the railroad company will be notified by letter from this office.

"Very respectfully, S. M. STOCKSLAGER,
"*Commissioner.*"

That thereafter the said Northern Pacific Railroad Company duly appealed from said decision of the Commissioner of the General Land Office to the Secretary of the Interior, and said Secretary of the Interior, on August 11, 1894, made and rendered his certain decision in the words and figures following, to wit:

"DEPARTMENT OF THE INTERIOR,
"WASHINGTON, *Aug.* 11, 1894.

"NORTHERN PACIFIC R. R. Co.
vs.
FRED HEWITT.

33 "The Commissioner of the General Land Office."

"SIR: I have considered the appeal of the Northern Pacific R. R. Co. from your office decision of September 25, 1888, holding for cancellation its indemnity selection of the N. E. ¼, sec. 13, T. 132 N., R. 57 W., Fargo, North Dakota, on account of the prior claim of Fred Hewitt under his pre-emption filing upon which he has submitted proof.

"Your office decision is based upon the holding that prior to selection lands within said limits are subject to appropriation as other public lands, which is in harmony with the recent decision of this department in the case of Jennie L. Davis *vs.* Northern Pacific R. R. Co. (19 L. D., —), and your office decision is therefore affirmed and the company's selection will be cancelled. Herewith I return the papers.

"Very respectfully, HOKE SMITH, *Secretary.*"

That thereafter, to wit, July —, 1895, letters patent were duly issued under the great seal of the United States purporting to convey to the said plaintiff, Fred Hewitt, the said northeast quarter (N. E. ¼) of section thirteen (13), township one hundred and thirty-two (132) north of range fifty-seven (57) west, North Dakota.

Defendants allege and aver, however, that said letters patent so issued to the said plaintiff were wrongfully issued under a mistake of law and of fact; that at the time the said Hewitt settled upon and applied to enter the said described land the said land was reserved lands of the United States not subject to settlement or entry under the provisions of said act of September 4, 1841, or the acts of Congress supplemental thereto or amendatory thereof, or under any acts of Congress; that said Hewitt abandoned said land prior to June 21, 1884, and that during all of the time the said
34 plaintiff resided upon said land it was reserved land and not subject to entry under the provisions of the acts of Congress hereinbefore referred to; that prior to the time of the said decision by the Commissioner of the General Land Office and the Secretary of the Interior awarding said land to said plaintiff, it had been selected by said Northern Pacific Railroad Company, and had in equity become the property of said company, and said company was the owner thereof and entitled to a patent therefor; that the said Commissioner of the General Land Office and the said Secretary of the Interior in their said decisions did not ascertain or determine, or attempt to ascertain or determine, the status of said land at the date the line of said Northern Pacific railroad coterminous therewith was definitely fixed and the plat thereof filed in the office of the Commissioner of the General Land Office, or at

the date said order of withdrawal, made in June, 1873, was made, or at the time said order was filed in the said United States district land office at Pembina; but the officers of the Interior Department, claiming and pretending that said land was not reserved, and that said orders of withdrawal were void, held that said land was subject to settlement and entry at the time the said plaintiff so settled upon and attempted to make entry thereof; that, in fact, the said plaintiff, Hewitt, never resided upon said land at any time when said described land was subject to entry under the pre-emption or homestead laws of the United States.

15. That June 21, 1884, the said defendant, Emil Schultz, believing said Northern Pacific Railroad Company was the owner of and entitled to the said northeast quarter of section thirteen, township one hundred and thirty-two north of range fifty-seven west, Dakota Territory, made and entered into a certain contract in writing with said railroad company, — agreed, in consideration of twelve hun-
35 dred dollars ($1,200), to sell and convey the said described land to said defendant, Emil Schultz, and the said Emil Schultz then and there agreed to purchase the said land from said company and to pay said railroad company therefor; that immediately upon entering into said contract the said defendant, Emil Schultz, established his residence upon the said described land and has since continued to reside thereon and cultivate and improve the same; that the improvements so placed upon said described land by said defendant, Emil Schultz, are of the value of over fourteen hundred dollars ($1,400); that at the time of entering into the said contract with said Northern Pacific Railroad Company the said defendant, Schultz, had no knowledge of any claim to the said described land by the said plaintiff, Hewitt, or by any one adversely to the claim of said Northern Pacific Railroad Company, and had no knowledge of any claims by or on behalf of said plaintiff prior to the year 1894; that the said defendant having paid the said Northern Pacific Railroad Company the consideration agreed by him to be paid to said company for said lands in said contract of sale, as aforesaid, the said company, on or about December 18, 1889, made, executed, and delivered their certain indenture of deed, whereby it conveyed to said defendant, Schultz, the said northeast quarter of section thirteen, township one hundred and thirty-two north of range fifty-seven west, Dakota, and the said defendant, Schultz, then and there became, has since remained, and now is the owner thereof.

That the said plaintiff at all times had full knowledge and actual notice of the reservation and appropriation of said described land for said Northern Pacific Railroad Company and of the selection of said land by said company, as hereinbefore set forth, and knew that said land was the property of said Northern Pacific Railroad Company; that said plaintiff knew, prior to the issuance of said
36 letters patent of the United States purporting to convey said described land to him, that these defendants were the owners of said land and were entitled to have the same conveyed by the said United States to the said Northern Pacific Railroad Company; that said plaintiff, having full knowledge and actual notice of all of said

facts, with the intent to defraud the said Northern Pacific Railroad Company and these defendants and to obtain said land for his own use and benefit and for the use and benefit of others combining and confererating to that end and for that purpose with the said plaintiff, caused and procured the said letters patent of the United States to be issued to said plaintiff; that said Northern Pacific Railroad Company did not do or cause or permit anything whatsoever (except its said conveyance of said land to these defendants) by which its claim, right, title, or interest to or in said described land has been in any act or thing whatsoever — by which their claim, right, title, or interest in or to said described land has been in any manner impaired or defeated; but the said land and each and every part thereof in equity and of right belonged to these defendants, and they ought to have the legal title thereto, if said legal title has not passed to said defendants, by virtue of the facts hereinbefore set forth; that the said plaintiff refuses to convey the said pretended title obtained by him under the letters patent of the United States, as aforesaid, and persists in asserting his said pretended claim to said land against these defendants.

16. That the said defendant, Friederika Schultz, is the wife of the said defendant, Emil Schultz.

Wherefore the defendants pray judgment:

First. That the said land h[illegible]before described be adjusged, decreed, and determined to be the [illegible]nd of and belonging to these defendants, and that they are equitably and legally entitled
37&38 to have and receive the absolute legal title thereto in fee-simple, and that the said plaintiff is not equitably and legally entitled to said land or any part thereof or any interest therein.

Second. That the plaintiff be ordered and decreed to make, execute, and deliver or cause to be made, executed, and delivered to these defendants such good and sufficient, necessary and proper instrument as shall be ordered and selected by the court conveying, releasing, assuring, and confirming to the defendants the full and perfect legal title to the said lands in fee-simple absolute, free of and clear from all and every lien, encumbrance, charge, or act made, done, caused, suffered, or permitted by the said plaintiff or by any person or persons claiming under, through, or by the said plaintiff whereby the claim, right, title, or interest of these defendants or either of them could be impaired.

Third. That until the execution and delivery of such instrument the judgment of the court stand and operate as such conveyance, release, assurance, and affirmation.

Fourth. That the plaintiff and his attorney or attorneys in fact and legal representatives be perpetually, as well as temporarily, and until the final judgment in this action, enjoined and restrained from making, obtaining, or procuring to be made and deed or other conveyance of said land or any part thereof adversely to these defendants or otherwise than to or for said defendants, and from causing, procuring, permitting, or aiding any other person to procure or obtain a conveyance or any conveyance and from conveying,

selling, assigning, or in any manner disposing of said lands or any part thereof or any legal interest therein, and from attempting or endeavoring so to do, and from in any manner charging or incumb-ring said land or any part thereof, and from attempting
39 and endeavoring to do so.

Fifth. That the defendants have such other and further relief as shall be just and equitable and judgment therefor, and for the costs of this action.

F. M. DUDLEY,
Attorney for Defendants.

40 STATE OF NORTH DAKOTA, } ss:
County of Sargent, }

In District Court, Fourth Judicial District.

FRED HEWITT, Plaintiff,
vs.
EMIL SCHULTZ and FREDERIKA SCHULTZ, Defendants.

Reply.

The plaintiff above named, for his reply to the answer and counter-claim of defendants herein, denies each and every allegation, matter, and thing in said answer contained, except such as are hereinafter specifically admitted, qualified, or explained.

Further replying to defendants' answer and counter-claim, plaintiff—

I.

Admits the incorporation of the Northern Pacific Railroad Company substantially as set forth in defendants' answer herein.

II.

Denies that the premises in controversy in this action were ever reserved from sale or location, homestead or pre-emption entry by qualified applicants therefor under the public land laws of the United States, and plaintiff alleges that the pretended withdrawals attempted to be made by the Department of the Interior on the 11th day of June, 1873, and May 17th, 1883, respectively, and all other pretended withdrawals of said department, as to all lands situated within the indemnity limits, so called, of all grants to said Northern Pacific Railroad Company were in violation of law and null and void for the reason and because of the facts that such pretended withdrawals were not made in the manner and
41 form required by law, and also that there was no authority whatever for the withdrawal by said Department of the Interior of said indemnity lands on account of the grants for said company, and also that the said department had no right or authority whatever to withdraw said lands from sale or location, pre-emption or homestead entry.

III.

Plaintiff has no knowledge or information sufficient to form a belief as to the truth of the matters and things set up in paragraph six of the said answer, and therefore denies the same and all thereof.

IV.

Plaintiff has no knowledge or information as to the truth or falsity of the several matters and things alleged in paragraph seven of the said ans-er, and therefore denies the same and every part thereof.

V.

Plaintiff has no knowledge or information as to whether those portions of paragraph eight of said answer purporting to be copies of departmental l tters and circulars are copies of such letters and circulars, and therefore denies that the originals of such letters or circulars were ever issued by the Department of the Interior; and plaintiff further denies each and every other allegation, matter, and thing in said paragraph eight of defendants' answer contained, and specifically denies that the question of the right and authority of the Secretary of the Interior to withdraw and reserve the lands within the limits of said Northern Pacific Railroad grant was finally determined and adjudicated and became *res adjudicata* or could not be reviewed by or was binding upon the successors of the said officers of the Department of the Interior or their subordinates, as claimed in said answer.

42 VI.

Plaintiff further denies that the said railroad company ever prepared a list of lands within its indemnity limits coterminous with the portion of its line extending from the Red River of the North to the Missouri river, and also denies that said company ever applied to select said lands last above mentioned as indemnity lands, and also denies that said company ever did select said lands as indemnity lands or for any purpose, or that the tract of land involved in this action has ever been selected by said company for indemnity purposes or for any purpose.

VII.

Plaintiff further denies each and every allegation, matter, and thing contained on page 18 of defendants' answer except what purports to be a copy of an order or circular issued by the Department of the Interior, and alleges that the said Department of the Interior had full authority and a legal right to revoke said withdrawals and attempted withdrawals and leave the lands within the indemnity limits of said company's grant subject to entry by settlers under the public land laws of the United States; and plaintiff denies that the said Northern Pacific railroad was or is entitled to all of the vacant indemnity lands within the said indemnity limits, or that all of said indemnity lands were appropriated for the benefit of the said com-

pany by the act of Congress approved July 2, 1864, or the joint resolution of Congress of May 31st, 1870, or any other act or resolution of Congress, or that said lands were, by said act of Congress or joint resolution, reserved for the benefit of said company, except to the extent of a sufficient amount thereof to indemnify it for actual losses in the place limits to be selected by said company, as provided by law. Plaintiff further avers that said company has not
43 sustained losses within the place limits of its grant to entitle it to all, but to only a small part, of said indemnity lands, and such small part should have been selected by said company from the whole indemnity lands, under the direction of the Secretary of the Interior, as provided by law; which selection the company has never made, and the pretended selection claimed to have been made by said company in the spring of the year 1883 was not attempted to be made until after this plaintiff had entered upon, made settlement, and had duly filed his declaratory statement for the said northeast quarter (N. E. ¼) of section numbered thirteen (13), in township numbeaed one hundred and thirty-two (132) north of range numbered fifty-seven (57) west; that the said pretended selection has never been approved by the Secretary of the Interior, nor was it made under his direction, and is absolutely null and void.

VIII.

Plaintiff has no knowledge or information as to the matters and things in paragraph twelve of defendants' answer, and therefore denies the same and all thereof.

IX.

Plaintiff demurs to all that part of paragraph thirteen of defendants' answer relating to the decision and proceedings of the Department of the Interior in the certain contest case between the Northern Pacific Railroad Company and John O. Miller on the grounds that the said allegations do not state facts sufficient to constitute any defense or counter-claim; and, replying to the residue of said paragraph thirteen, plaintiff denies that the said company rearranged its list of selections as alleged, and further denies that the said northeast quarter (N. E. ¼) of section numbered thirteen (13), in township numbered one hundred and thirty-two (132) north of range numbered fifty-seven (57) west was ever selected by said company in
44 accordance with law, and that if said company ever did make a pretended selection thereof the same was not done under the direction of nor approved by the Secretary of the Interior, and for the reasons hereinbefore mentioned such alleged selection is null and void.

Plaintiff also alleges and avers that the said Northern Pacific Railroad Company was not entitled to take the tract in controversy or any indemnity lands for the alleged loss of or in lieu of the southeast quarter (S. E. ¼) of section numbered twenty-one (21), in township numbered forty-four (44) north of range numbered nine (9) west of the fourth principal meridian, situated in the State of

Wisconsin, by reason of the fact that the same was reserved and appropriated by the United States to aid in the construction of a certain line of railroad under the provisions of the act of Congress approved June 3, 1856, entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State."

Plaintiff denies that the said company ever revised its alleged indemnity selection lists as alleged in paragraph 13 of the answer or at all.

X.

Plaintiff admits that on November 2, 1882, he filed a declaratory statement, No. 11747, in the United States land office at Fargo, North Dakota, and that he alleged settlement upon the tract herein involved on the 10th day of April, 1882, substantially as alleged in the said answer.

Plaintiff demurs to all that part of the defendants' answer relating to the tender of his final proof, its rejection, and all the alleged proceedings of the Department of the Interior as embraced in pages 25, 26, 27, 28, and the first half of page 29 on the ground that same does not state facts sufficient to constitute any defense or counterclaim to or in this action.

45 In this connection plaintiff alleges that he settled upon said tract in good faith on or about the said 10th day of April, 1882, actually residing thereupon more than the required time to entitle him to make final proof and payment therefor; that he made final proof for the tract satisfactory to the Department of the Interior as to his residence, improvements, and good faith and in all other respects, and in due time payment of the Government price was made to the United States, the usual receiver's duplicate receipt issued, and on the — day of July, 1895, letters patent *to* the United States were duly issued conveying the said tract to him.

That all these facts as to the sufficiency of plaintiff's compliance with the law relating to settlement, residence, and improvements upon said tract to entitle him to a patent therefor have been found and determined by the Department of the Interior favorable to plaintiff and awarding him the land, and in the absence of fraud such facts are conclusive upon this and all other courts.

Plaintiff denies that said letters patent were wrongfully issued under a mistake of law or of fact, or that at the time plaintiff settled upon or applied to enter said land it was reserved land of the United States, not subject to settlement or entry under the provisions of the act of September 4th, 1841, and supplemental acts.

Plaintiff further denies that he abandoned the said land prior to June 21, 1884, or at any other time, but alleges that ever since tendering final proof and payment, as hereinbefore alleged, on the 4th day of April, 1883, he has been and now is the owner in fee-simple of said tract and all thereof, and was in actual, open, and notorious possession thereof from the said 10th day of April, 1882, the date of settlement thereon, to and subsequent to the said 4th day of

46 April, 1883, the date of tendering final proof and payment therefor.

And plaintiff also denies that said company ever became in equity or otherwise the owner of said land or ever was entitled to a patent therefor; but, on the contrary, the Secretary of the Interior, in the certain contest case entitled Northern Pacific Railroad Company against Fred Hewitt, involving plaintiff's right to this land, has finally found and determined the facts to be that the said land was never legally withdrawn or reserved from entry or sale; that said land was not selected or attempted to be selected by the said company until subsequent to the said settlement and entry of plaintiff; that the attempted selection by said company of said tract was never approved by the Secretary of the Interior, and that in any event the company was not entitled to said tract for indemnity purposes, nor especially in lieu of the said land in the State of Wisconsin. The said company appeared in said contest, submitted itself to the jurisdiction of the Department of the Interior, and appealed from certain decisions rendered in that department, substantially as set out in the answer.

XI.

Plaintiff denies each and every allegation in paragraph 15 of defendants' answer contained, except only that plaintiff admits the execution and delivery of the deed by the said company to defendant Emil Schultz on or about December 18th, 1889, and refusal to convey said premises to these defendants, and specifically denies that said defendant, Emil Schultz, ever believed or had reason to believe the said land was owned by said company, and further specifically denies that the improvements placed upon the said described land by defendant Emil Schultz are of the value of over fourteen hundred dollars (1,400) or of the value of any sum greater than six hundred (600) dollars; plaintiff avers in this con-
47 nection that said improvements were not made by said defendant in good faith under color of title; but defendants knew or should have known at the time of purchasing and entering upon said tract that said company had no right or title whatever thereto and had no right, either in law or equity, to sell or contract to sell the same or any part thereof.

Wherefore plaintiff prays judgment as prayed in his complaint.

Dated September 27, 1895.

T. A. CURTIS,
Plaintiff's Attorney, Lisbon, N. D.

48 STATE OF NORTH DAKOTA, } ss:
County of Sargent, }

District Court.

FRED HEWITT, Plaintiff,
vs.
EMIL SCHULTZ and FREIDERIKA SCHULTZ, Defendants.

Stipulation.

It is hereby stipulated by and between the parties hereto that the following are and shall constitute the facts and all of them, except as herein provided, in the above-entitled action, and shall constitute the evidence of the same:

1. That the Northern Pacific Railroad Company is a corporation created, organized, and existing under and by virtue of an act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound, on the Pacific coast, by the northern route," and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

That by the terms and provisions of said act said corporation was authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route as should be determined by said company, within the territory of the United States on a line north of the 45th degree of latitude, to some point on Puget's sound, with a branch, via the valley of the Columbia river, to a point at or near Portland, in the State of Oregon.

49 By the third section of said act lands were granted to said railroad company as follows:

"That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, * * * every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of the said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in

alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. * * *

Provided, further, that all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road, may be selected as above provided: And provided further, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal."

By section 4 of said act it was further provided that whenever said company should have twenty-five consecutive miles
50 of any portion of said railroad and telegraph line ready for the service contemplated the President of the United States should appoint three commissioners to examine the same, and if it should appear that such twenty-five consecutive miles of said road and telegraph line had been completed in a good, substantial, and workmanlike manner, as in all other respects required by said act, the commissioners should so report to the President of the United States and patents of lands, as aforesaid, should be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road, and that whenever from time to time twenty-five additional consecutive miles should have been constructed, completed, and in readiness, as aforesaid, and verified by said commissioners to the President of the United States, then patents should be issued to said company conveying the additional sections of land, as aforesaid, and so on as fast as every twenty-five miles of said road should be so completed.

By section 6 of said act it was further provided as follows: That the President of the United States should cause the land to be surveyed for forty miles in width on both sides of the entire line of said road after the general route thereof was fixed and as fast as might be required by the construction of said road, and that the odd-numbered sections of said land thereby granted should not be liable to sale or entry or pre-emption before or after they were surveyed except by said company; that said act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound, on the Pacific route" (13 U. S. Stat., 365), shall be considered to be in evidence herein.

51 2. That within two years after the passage of said act the said railroad company duly accepted the terms, conditions, and impositions thereof in writing, under its corporate seal, executed pursuant to the directions of its board of directors first had and obtained, and on December 29, 1864, served such acceptance on the President of the United States.

3. That thereafter, by a joint resolution approved May 31, 1870, entitled "A resolution of Congress authorizing the Northern Pacific Railroad Company to issue bonds for the construction of its road and to secure the same by mortgages and for other purposes, it was resolved and provided that in the event of there not being in any State or Territory in which said main line or branch might be located at

the time of the final location thereof the amount of lands granted by said act to said company within the limits prescribed by its charter the said company should be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States and designated by odd numbers in such State or Territory within ten (10) miles on each side of said road beyond the limits prescribed in said charter as would make up the deficiency in said main line or branch (except mineral or other lands as excepted in the charter of said company by said act of Congress approved July 2, 1864) to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of said act of July 2, 1864; that said joint resolution of May 31, 1870, shall be considered to be in evidence herein.

4. That prior to the 30th day of March, 1872, the said railroad company had duly located the general route of its road from the Red River of the North to the Missouri river, in the then
52 Territory of Dakota, now State of North Dakota, and also prior to the said 30th day of March, 1872, the said railroad company transmitted a diagram or map showing the said designated route of said road to the Commissioner of the General Land Office; that said diagram or map was duly filed in the office of the said Commissioner, and on the 30th day of March, 1872, said Commissioner of the General Land Office transmitted a prepared diagram showing the designated route of the said railroad company under act of July 2nd, 1864, to the register and receiver of the United States land office at Pembina, Dakota Territory, copy of the letter of transmittal being as follows, to wit:

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *March 30th*, 1872.

Register and receiver, Pembina, Dakota Ter.

GENTLEMEN: I transmit herewith a diagram showing the designated route of the Northern Pacific railroad under act of July 2, 1864, and by direction of the Secretary of the Interior you are directed to withhold from sale or location, pre-emption or homestead entry all the surveyed or unsurveyed odd-numbered sections of public lands falling within the limits of forty miles, as designated on this map.

You will also increase in price to $2.50 per acre the even-numbered sections within those limits, and dispose of them at that ratability and under the pre-emption and homestead laws only, no private entry of the same being admissable until these lands have been offered at the increased price.

This order will take effect from the date of its receipt by you, and you are requested to acknowledge, without delay, the time of
53 its receipt.

Very respectfully,
(Signed) W. W. CURTIS,
Acting Commissioner.

Receipt ack'g'd April 22, 1872.
I 97526.

That on the 22nd day of April, 1872, said map or diagram was duly filed in the United States land office at Pembina, Dakota Territory, and receipt of such letter duly acknowledged by the register and receiver of said land office to the Commissioner of the General Land Office, and the said register and receiver of the Pembina land office made and designated upon the records of the said office the notations in accordance with the said map or diagram; that the tract hereinafter described and involved in this action was coterminous with said line of general route so located prior to March 30th, 1872, as aforesaid.

5. That said railroad company duly proceeded with the work of surveying and definitely locating the line of its said railroad; that prior to May 24, 1873, the said company had definitely located that portion of the line of its road extending from the Red River of the North to the Missouri river in the Territory of Dakota, now State of North Dakota; that on the 24th day of May, 1873, the said company transmitted a map of that portion of its said line of railroad so definitely located to the Secretary of the Interior, and that on May 26, 1873, the Secretary of the Interior transmitted said map to the Commissioner of the General Land Office with the following letter, to wit:

"DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., 26 *May*, 1873.

SIR: I transmit herewith for appropriate action map of the definite location of the Dakota division of the Northern Pacific
54 railroad between the Red and Missouri rivers, received on the 24th instant with letter of same date from W. K. Mendenhall, Esq., att'y for the Co. in this city.

Very respectfully, your ob't servant,

C. DELANO, *Secretary*.

Hon. Willis Drummond, Comm'r G. L. O."

That on the same day, to wit, May 26, 1873, said map was duly filed in the office of the Commissioner of the General Land Office; that upon the filing of said map or plat the said Commissioner made and designated upon the maps and records of his said office the limits of the lands granted by Congress to said railroad company to aid in the construction of the said railroad coterminous with the said line, as shown on said plat, namely, forty (40) mile and fifty (50) mile limits on each side of said line of definite location, the first named being the lands in place and hereafter, for the purpose of convenience, being designated the place lands; the second being the limits of the indemnity provided for in the act of Congress approved July 2, 1864, hereafter, for convenience, designated the indemnity lands. Thereafter the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, transmitted to the United States district land officers for the district through which said line of definite location extended, and within which such place and indemnity lands fell, a diagram showing that portion of the line of said railroad so definitely fixed, as aforesaid, with the place and indemnity limits indicated thereon, and

transmitted with said diagram the following letter of instructions, to wit:

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *June 11th*, 1873.

Register and receiver, Pembina, D. T.

GENTLEMEN: The Northern Pacific Railroad Company
55 filed in this office on the 26th ultimo, in accordance with the law, a map of the definite location of their road from the Red River of the North to the Missouri river in Dakota Ty. I have accordingly prepared a diagram, which is herewith transmitted, showing the forty and fifty mile limits of their land grant along said line, with also the forty-mile limits of withdrawal, ordered by my letter to you of March 30th, 1872, upon a designated line, and you are hereby directed to withhold from sale or entry all the odd-numbered sections, both surveyed and unsurveyed, falling within those limits, and to hold subject to pre-emption and homestead entry only the even-numbered sections at $2.50 per acre within the forty-mile limits and $1.25 per acre between the forty and fifty mile or indemnity limits.

The even-numbered sections within the forty-mile limits of former withdrawal now falling without the present corrected limits will be reduced in price to $1.25 per acre.

The right of the road attached to both surveyed and unsurveyed lands from the date of filing the map of definite location in this office, to wit, May 26, 1873, from which date also the even-numbered sections became double minimum. Be pleased to acknowledge the date of the receipt of this letter.

Very respectfully, W. W. CURTIS,
Acting Commissioner."

That said letter and diagram were duly received and filed in the said district land office at Pembina, that being the district within which said lands were situate, June 24, 1873.

The northeast quarter (N. E. ¼) of section thirteen (13), in township one hundred and thirty-two (132) north of range fifty-seven (57) west of the fifth principal meridian, North Dakota, was co-
56 terminous with said line of definite location so fixed May 26, 1873, as aforesaid, and was more than forty, but within fifty miles thereof, being within the indemnity limits, and was, at the date of said grant, at the time said line was definitely fixed and the plat thereof filed in the office of the Commissioner of the General Land Office, and at the time said above letter of the acting Commissioner, dated June 11th, 1873, was written, and at the time it was received at the said United States district land office at Pembina, and at all times herein mentioned, except as otherwise hereinafter set forth, public land to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, and was and is non-mineral in character, and that said alleged order of withdrawal remained in force until revoked under the order of the Secretary of the Interior of August 15, 1887.

6. That said Northern Pacific Railroad Company, prior to 1885, duly definitely located its said line of railroad and filed the maps thereof in the office of the Commissioner of the General Land Office, which said maps were duly approved by the Secretary of the Interior, and thereafter said company duly constructed and completed that portion of its said railroad and telegraph line on, over, and along said line of definite location, extending from Lake Superior to Puget sound, as aforesaid (both main and branch line), in all respects as a first-class railroad and telegraph line; that as fast as portions of said railroad and telegraph lines equal to or exceeding twenty-five (25) miles in length were so constructed, as aforesaid, they were examined by commissioners appointed by the President of the United States, and by said commissioners were found and reported to have been constructed in a good, substantial, and workmanlike manner, in all respects as required by said act of Congress: that such reports were duly accepted and approved by the
57 President of the United States, as provided in said act of Congress approved July 2, 1864.

That the portion of said railroad and telegraph line extending on, over, and along said line of definite location from the Red River of the North to the Missouri river was so completed prior to November, 1873; that the President of the United States having appointed three commissioners to examine the same, the said commissioners so examined it, and on the 24th day of November, 1873, reported to the Secretary of the Interior that said portion of said railroad and telegraph line had been constructed in a good, substantial, and workmanlike manner, in all respects as required by the act of Congress; that thereafter, to wit, November 28, 1873, the said Secretary of the Interior transmitted said report to the President of the United States with the following recommendations: "The commissioners in their report represent that this portion of the road has been (in the main) constructed in a first-class manner. I would therefore recommend the acceptance of the same and the issuance to the company of patents for lands due on account of the completion thereof;" that said report was accepted and said recommendations approved by the President of the United States December 1, 1873.

7. That on March 19, 1883, the said Northern Pacific Railroad Company filed in said land office at Fargo, Dakota, being the district land office of the United States for the district embracing the lands contained in said list, a certain list of selections under its said grant, embracing the said northeast quarter of section 13, township 132 north of range 57 west of the fifth principal meridian, claiming said tract under said act of July 2, 1864, and paid to the receiver of said office the fees required by law; that said tract was within the said Fargo United States land district, and was within the indemnity limits of the said grant to the said company. The regis-
58 ter and receiver of said land district accepted and filed said list, and attached thereto the following certificate:

"UNITED STATES LAND OFFICE,
"FARGO, DAKOTA, *April* 9, 1883.

"We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Northern Pacific Railroad Company under the grant to the said company by acts of Congress approved July 2, 1864, and joint resolution approved May 31, 1870, and selected by said Northern Pacific Railroad Company, by Charles B. Lamborn, the duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct; and we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States and within the limit of fifty miles on each side, and that the same are not nor is any part thereof returned and denominated as mineral land or lands not claimed as swamp lands; npr is there any homestead, pre-emption, State, or other valid claim to any portion of said lands on file or record in this office.

"We further certify that the foregoing list shows an assessment of the fees payable to us allowed by the act of Congress approved July 1, 1864, and contemplated by the circular of instructions dated January 24, 1867, addressed by the Commissioner of the General Land Office to registers and receivers of the United States land offices, and that the said company have paid to the receivers on Mar. 19, 1883, the full sum of five thousand four hundred and eighty-seven & $\frac{20}{100}$ dollars in full payment and discharge of said fees.

"HORACE AUSTIN, *Register.*
"E. C. GEAREY, *Receiver.*"

That on May 28, 1883, the Secretary of the Interior issued
59 the following instructions of the department, to wit:

"The Commissioner of the General Land Office.

"SIR: It is my desire to open for settlement as speedily as possible all the lands within the indemity limits of the grant to the Northern Pacific Company not actually required to supply the lands lost in place within the granted limits.

"The grant should be adjusted at the earliest possible time, that the orders of withdrawal may be vacated without unreasonable delay, as indicated in my letter of the 17th instant. The unparalleled demand for lands for actual settlement by great numbers of persons, not only from foreign countries, but from the older States, seeking homes under the settlement laws along the line and within the vicinity of the Northern Pacific grant requires, for the best interests of the country and for all parties concerned, that the withdrawals should not be maintained any longer than is actually necessary for the adjustment of the guaranteed rights of the company.

"In order to facilitate the work of making selections I think you should instruct the local officers that when clear lists of selections free from conflict or other objection are filed with the district offi-

cers and approved by them said selections should at once be marked upon their books and forwarded for final examination, leaving the ascertainment of the lands lost in place to your office, instead of requiring preliminary lists of such lost lands, together with the indemnity lands, tract for tract, from the company as heretofore.

"I am satisfied that the work of adjusting the grant will go forward much more rapidly under this plan than under the former practice.

"Very respectfully, H. M. TELLER, *Secretary.*"

That the decision of Acting Secretary Chandler, of the In-
60 terior Department, dated May 1, 1891, entitled "Sawyer *vs.* Northern Pacific R. R. Co.," as published in vol. 12 of the Decisions of the Department of the Interior Relating to Public Lands, on page 448 and following pages, shall be considered and is hereby introduced as evidence in this case.

That on August 4, 1885, the Commissioner of the General Land Office issued the following circular of instructions, approved by the Secretary of the Interior, to wit:

"Before admitting railroad indemnity selections in any case you will require preliminary lists to be filed specifying the particular deficiencies for which indemnity is claimed. You will then carefully examine your records, tract by tract, to ascertain whether the loss to the grant actually exists as alleged. You will admit no indemnity selection without a proper basis therefor. If you are in doubt whether the company is entitled to indemnity for losses claimed, you will transmit the preliminary lists to this office for instructions, and will not place the selections on record until directed so to do.

"Where indemnity selections have heretofore been made without specifications of loss you will require the companies to designate the deficiencies for which such indemnity is to be applied before further selections are allowed. The selecting agent applying to make indemnity selections must state in his affidavit attached to the list presented that the specific losses for which indemnity is claimed are truly set forth and described in said list, and that said losses have not heretofore been indemnified in any manner.

"Where deficiencies exist for which indemnity is allowed by law the lieu selections must be made from vacant unappropriated land
within proper sections and limits nearest the granted sections
61 in which the loss occurred. You will be careful to see that this rule is strictly complied with, and will reject all selections not made in conformity thereto.

"Approved:

"L. Q. C. LAMAR, *Secretary.*"

That on October 12, 1887, the Northern Pacific Railroad Company filed in said United States district land office at Fargo a list designating an amount of lands equal to those selected in said list of March 19, 1883, claimed to have been lost and excepted from

said grant and within the place limits of said grant as defined on definite location and as a basis for said selections.

That the decision of Acting Secretary Chandler, of the Interior Department, dated June 10th, 1891, in the case of St. Paul, Minneapolis & Manitoba R'y Co. and St. Paul and Northern Pacific R. R. Co., published in vol 13 of the Decisions of the Department of the Interior Relating to Public Lands, on page 349 and following pages, shall be considered, and is hereby introduced in evidence in this case.

That thereafter, on February 23, 1892, the said Northern Pacific Railroad Company duly filed in said United States district land office at Fargo a rearranged list, in which it designated the lands theretofore selected, as aforesaid, in said list filed March 19, 1883, and therein set opposite each specific description of land so selected the description of a tract of equal area lost from its grant in place and in lieu of which such indemnity lands had been selected, and therein set opposite the said northeast quarter of section 13, township 132, range 57, and as a basis for the selection of the same the southeast quarter of section 21, township 44 north of range 9 west of the 4th principal meridian, Wisconsin; that said last-described tract was coterminous with and within twenty miles of the portion of said line of said Northern Pacific railroad
62 as definitely fixed, extending through the State of Wisconsin, and was at the date of the grant to the Northern Pacific Railroad Company and at the time the line of said railroad coterminous therewith was definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office, as aforesaid, reserved and appropriated by the United States to aid in the construction of a certain line of railroad under the provisions of the act of Congress approved June 3, 1856, entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State," and was at the date of said act of June 3, 1856, and at the time of the definite location of the road in aid of which said act was passed public land and free from pre-emption and other claims and rights, and that the railroad provided for by said act of June 3, 1856, was definitely located prior to the definite location of the Northern Pacific railroad in Wisconsin; that at the date of said selection by said company of said northeast quarter of section thirteen, township 132, range 57, there were no filings or entries or applications to make filing or entry for said tract other than the filing and entry of said plaintiff, as herein set forth; that said selection has never been approved by the Secretary of the Interior except as herein set forth, and neither the Department of the Interior nor the Secretary of the Interior nor any department of the Government has ever made certification that the said company was entitled to the same or to letters patent for the same, but was cancelled by said Secretary in his decision set forth in the ninth paragraph hereof; that, except as herein set forth, letters patent or any evidence of title whatsoever for said tract has never been issued or made to said company or to any person or persons whomsoever except to this plaintiff.

63 8. That under date of May 2, 1896, the Commissioner of the General Land Office made the following certificate, to wit:

"I, S. W. Lamoreux, Commissioner of the General Land Office, do hereby certify that I have caused examination to be made of the records of this office relative to the grant to the Northern Pacific Railroad Company under acts of Congress approved July 2, 1864, and May 31, 1870, and certify that said records show that the total area of lands excepted from and lost to said grant within its primary limits amounts to 10,624,746.27 acres, and that there are within the first indemnity limits not to exceed 7,065,523.49 acres which are, or will be when surveyed, available for selection to satisfy the losses above referred to, thus leaving a known deficiency of 3,559,222.78 acres in said grant which cannot be satisfied from the limits as now recognized by this office.

(Signed) S. W. LAMOREUX,
Commissioner."

9. That the said southeast quarter of section 21, township 44 north of range 9 west of the 4th principal meridian, Wisconsin, so assigned as a basis for the selection of said northeast quarter of section 13, in township 132 north of range 57 west, lies east of Superior city, in the State of Wisconsin; that on November 14, 1895, the Secretary of the Interior rendered a decision, wherein he held that said act of Congress of July 2, 1864, and the acts supplemental thereto and amendatory thereof did not grant to said Northern Pacific Railroad Company any lands east of Superior city, in the State of Wisconsin, and that said company is not entitled under said acts or any of them to take lands east of Superior city; that said Secretary in said decision further ruled as follows:

"I further learn upon inquiry at your office that the lands east of Superior city were made the basis of the selection of a
64 large quantity of lands from the indemnity belt of the company's grant in North Dakota. These selections having been made some while ago, many, if not all, of the lands selected have perhaps been sold by the company.

"The previous action of this department giving color to the company's right to a grant east of Superior city and the application of the rule that the indemnity lands should be selected nearest of those lost were the probable causes for the specification of these lands as a basis for the selection referred to.

"In view thereof I have to direct that the company be allowed sixty days from notice of this decision within which to specify a new basis for any of its indemnity selections avoided by this decision, and that during that period no contests against such selections where the charge is that the basis was made of land east of Superior city or application to enter under the settlement laws will be received."

That within sixty days from the notice of said decision and on November 26, 1895, the said railroad company, in compliance with said order, specified as a basis for its said selection of the said north-

east quarter, section 13, township 132 — of range 57, the northeast quarter of section 1, in township 3 north of range 33, in the State of Montana, and duly filed said specification on said date in the office of the Commissioner of the General Land Office, in accordance with the said direction of the Secretary of the Interior; that said last-described tract was, at the date of said grant to said company and at the date of the definite location of its line of railroad opposite thereto, within the Crow Indian reservation; that said tract was, at the date of said grant and of said definite location, within forty miles of the line of said railroad as definitely located through said State, then Territory, of Montana; that in so
65 assigning said tract as a basis for said selection said railroad company, by its land commissioner, William H. Phipps, filed therewith in the office of said Commissioner the following statement, to wit:

"Whereas the Hon. Secretary of the Interior did on the fourteenth day of November, 1895, render a decision wherein he held that the Northern Pacific Railroad Company had no grant of lands opposite to and coterminous with its railroad between Superior and Ashland, and that therefore the designation of losses between those points as a basis for the selection of indemnity land elsewhere was invalid; and

"Whereas the Secretary of the Interior in said decision of November fourteenth, 1895, did direct that the said Northern Pacific Railroad Company be allowed sixty days from notice of said decision within which to designate other losses within its said grant in lieu of those within the points theretofore assigned; and

"Whereas the Northern Pacific Railroad Company has heretofore sold a large portion of its indemnity lands, the title to which is affected by the decision of the Secretary of the Interior of November fourteenth, 1895, hereinbefore referred to:

"Now, therefore, the said Northern Pacific Railroad Company, because of said decision of the Secretary of the Interior and to facilitate the adjustment of the title to said indemnity lands so affected by said decision, reserving and saving all rights of the company heretofore acquired and expressly maintaining and insisting that all provisions of the act of July 2, 1864, for its benefit are in all respects in full force and operation as far east as Ashland, the Northern Pacific Railroad Company, for the sole purpose of protecting and saving the titles of its purchasers to indemnity
66 lands affected by the decision of the Secretary of the Interior of November fourteenth, 1895, hereby submits, pursuant to the directions of said decision, a list of losses to be substituted for those heretofore embraced in Fargo list No. 6 as originally filed on March 19, 1883, and rearranged February 23rd, 1892.

"And the said company prays the approval of said amended list and the prompt issuance of patent therefor.

"WM. H. PHIPPS,
"*Land Commissioner N. P. R. R. Co.*"

That said tract so assigned as a basis for the selection of said northeast quarter of section 13, in township 132 no. of range 57, was accepted from said grant to said company by reason of being included in said Indian reservation, and said company was entitled to select indemnity therefor.

9. That on or about the tenth day of April, 1882, plaintiff, being qualified to hold and acquire land under the pre-emption laws of the United States, settled upon and improved the said northeast quarter of section thirteen (13), in township one hundred and thirty-two (132) north of range fifty-seven (57) west of the 5th principal meridian, in the county of Sargent, State of North Dakota, then the Territory of Dakota, with the intention of entering the same under the provisions of the act of Congress approved September 4, 1841, and the acts supplemental thereto and amendatory thereof, authorizing the entry and purchase of public lands of the United States by the citizens thereof and those who have declared their intention to become such citizens, and that on the 2nd day of November, 1882, he duly presented to the United States land office at Fargo, Dakota Territory (now State of North Dakota), a declaratory statement, No. 11747, for said tract, as provided by law, which was duly received, filed, and placed upon the records of the
67 said land office.

10. That plaintiff resided upon and cultivated said land, as required by law, from the said 10th day of April, 1882, to the 4th day of April, 1883, at which latter date he submitted final proof therefor, as provided by law, and then and there dul*t* tendered the Government price for said tract, together with all required fees, to the said land office, and that said final proof was then and there rejected by the register and receiver of the United States district land office, they assigning as a reason therefor that the described land had been withdrawn from entry under the said act of July 2, 1864, and the acts of Congress supplemental thereto and amendatory thereof; that plaintiff duly appealed from the said decision of the district land office to the Commissioner of the General Land Office, who, on the 5th day of October, 1883, affirmed the decision of the district land office; that the plaintiff had no notice whatsoever of the said decision of October, 1883, until on or about the 1st day of August, 1888, at which date he made application for a review thereof by the Commissioner of the General Land Office, and thereupon that officer, on the 25th day of September, 1888, rendered the following decision, to wit:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *Sept.* 25, 1888.

"Register and receiver, Fargo, Dakota.

"GENTLEMEN: I have considered the application of Fred Hewitt for a review of office decision of October 5, 1883, affirming your action in rejecting his final proof for N. E. ¼ section 13, towns. 132 N., range 57 W.

"Said tract is within the 50-mile indemnity limit of the
68 withdrawal for the benefit of the Northern Pacific R. R. Co. ordered by letter from this office, dated June 11, 1873, received at the local land office then at Pembina June 24, 1873. The township was surveyed July 12 to 27, 1882, and the plat of survey was filed in your office on the 13th day of October following. The whole of said section was selected by the agent of the railroad company March 19, 1883, as per list No. 6.

"The records here show that Hewitt presented his final pre-emption proof at your office, which was rejected for conflict with the withdrawal and selection above recited, and from this action Hewitt appealed.

"Your decision was confirmed by this office as being in accordance with the instructions contained in the circular approved May 26, 1883.

"Hewitt asks for a review of the above decision on the ground that he never received any notice thereof until recently informed by an attorney at Washington.

"The final proof submitted by applicant shows that he is a native-born citizen, over twenty-one years of age, and a qualified pre-emptor July 10th, 1882; his improvements consisted of a frame house 16 x 16 feet, stable 10 x 12 feet, and 20 acres of ground broken, the value of the same being estimated at $350. This declaratory statement was presented for filing within the time prescribed by law and was accepted by your office, a receipt issuing therefor.

"Under the late decision of the Hon. Secretary of the Interior in the case of The Northern Pacific R. R. Co. *vs.* Guilford Miller it is held that the withdrawal of indemnity lands for the benefit of said company was prohibited by the 6th section of the granting act, and, being in violation of the law and without effect, was not operative to defeat the rights of *bona fide* adverse claimants under the
69 general laws of the United States who settled on lands within such limits prior to the time when selection by the railroad had been made.

"In view of the fact that claimant established his actual residence and had permanent improvements upon the land prior to the Government survey or selection by the railroad company, his claim was superior thereto, and hence office decision of October 5, 1883, is set aside, Hewitt's final proof admitted, and the selection by the railroad company held for cancellation.

"Advise all parties in interest promptly of this decision and that 60 days will be allowed for appeal.

"The resident attorneys for the railroad company will be notified by letter from this office.

"Very respectfully, S. M. STOCKSLAGER,
"*Commissioner.*"

That the said case of Northern Pacific Railroad Company *vs.* Guilford Miller and the report thereof shall be considered to be in evidence herein and may be considered by the court.

That thereafter the said Northern Pacific Railroad Company duly

appealed from said decision of the Commissioner of the General Land Office to the Secretary of the Interior, and said Secretary of the Interior on August 11, 1894, made and rendered his certain decision in the words and figures following, to wit:

"DEPARTMENT OF THE INTERIOR,
"WASHINGTON, *Aug.* 11, 1894.

"NORTHERN PACIFIC R. R. Co.
vs.
FRED HEWITT.

"The Commissioner of the General Land Office.

"SIR: I have considered the appeal of the Northern Pacific
70 R. R. Co. from your office decision of September 25, 1888, holding for cancellation its indemnity selection of the N. E. ¼ sec. 13, T. 132 N., R. 57 west, Fargo, North Dakota, on account of the prior claim of Fred Hewitt under his pre-emption filing, upon which he has submitted proof.

"Your office decision is based upon the holding that prior to selection lands within said limits are subject to appropriation as other public lands, which is in harmony with the recent decision of this department in the case of Jennie L. Davis *vs.* Northern Pacific R. R. Co. (19 L. D., —), and your office decision is therefore affirmed, and the company's selection will be cancelled. Herewith I return the papers.

"Very respectfully, HOKE SMITH, *Secretary.*"

That the said case of N. P. R. R. Co. *vs.* Davis (Davis *vs.* N. P. R. R. Co.) and the report thereof shall be considered to be in evidence herein and may be considered by the court.

That on June 22, 1895, pursuant to said decision of the Secretary of August 11, 1894, and based upon said pre-emption final proof so made, as aforesaid, by said plaintiff, letters patent of the United States were duly issued under the great seal of the United States, purporting to convey to said plaintiff the said northeast quarter of section 13, township 132 of range 57, North Dakota.

11. That from the said 10th day of April, 1882, to the 21st day of June, 1884, plaintiff resided upon and was in the actual possession of said tract and every portion thereof and had valuable improvements thereon.

12. That on June 21, 1884, and while plaintiff was so in possession of said land the said defendant, Emil Schultz, made and entered into a certain contract in writing with the said rail-
71 road company, by the terms whereof said railroad company agreed, in consideration of twelve hundred dollars ($1,200), to sell and convey the said northeast quarter of section 13, township 132, range 57, to the said defendant, Emil Schultz, and the said Emil Schultz then and therein agreed to purchase the said land from the said company and to pay to said company the said sum therefor; that upon the making of said contract the said Emil Schultz entered upon said tract and ousted said plaintiff from the

actual possession thereof and took up his residence thereon, and has since continued to reside thereon and cultivate and improve the same; that the said defendant, Schultz, having paid to the said railroad company the consideration agreed by him to be paid to said company for said land on said contract of sale, as aforesaid, the said company, on or about December 18, 1889, made, executed, and delivered its certain indenture of deed, with full covenants of warranty, whereby it conveyed to the said defendant, Schultz, the said northeast quarter of section 13, in township 132 north of range 57 west.

13. The plaintiff has not at any time made a conveyance or attempted conveyance of said premises, but now holds any and all title thereto which he may have received from the United States, as hereinbefore set forth.

The said defendant, Schultz, has not at any time made a conveyance or attempted conveyance of the said premises, but now holds any and all title thereto which he may have received from the said Northern Pacific Railroad Company by virtue of the said contract and deed.

14. That the value of the rents, issues, and profits of said tract during the time of its occupancy by said Schultz, as aforesaid, is the sum of seven hundred and fifty (750) dollars.

15. That the value of the improvements made upon said
72 tract by said defendant, Schultz, is the sum of six hundred (600) dollars, and the value of the land without the improvements is the sum of eight hundred (800) dollars.

16. That the said defendant Friederika Schultz is the wife of the said defendant Emil Schultz.

17. That none of the buildings or improvements made or placed upon the tract involved in this action, to wit, the northeast quarter (N. E. ¼) of section thirteen (13), township one hundred thirty-two (132) north of range fifty-seven (57) west by the defendants or either of them, were made or placed thereupon while the defendants or either of them were holding under color of title adversely to the claim of plaintiff in good faith.

18. That if the plaintiff in this section shall prevail the defendants and each of them hereby waive all claim or right of recovery against plaintiff by counter-claim or otherwise for the value of said buildings and improvements or either or any of them, and consent and agree that proper findings in accordance with this stipulation may be made and judgment and decree based thereon may be entered accordingly in this action.

19. That the tract of land involved in the action entitled Grandin *vs.* Le Bar, as reported in 57 N. W. Rep., 241 and the pages following, was selected by the said Northern Pacific Railroad Company at the same time and included in the same list of selections as the tract involved in this action, and the foregoing certificate, dated April 9th, 1883, on pages 8 and 9, is appended to the said list of selections, included in which list is the tract involved in the case of Grandin *vs.* Le Bar aforesaid.

20. That either party to this action may submit other or
73 further evidence in this action.

THOMAS A. CURTIS,
PIERCE & AUSTIN,
Attorneys for Plaintiff.
BALL, WATSON & MACLAY,
JAMES B. KERR,
J. B. McNAMEE,
Attorneys for Defendants.

74 STATE OF NORTH DAKOTA, } ss:
County of Sargent, }

In District Court, Fourth Judicial District.

FRED HEWITT, Plaintiff,
vs.
EMIL SCHULTZ and FREDERIKA SCHULTZ, Defendants.

Findings of Fact and Conclusions of Law.

The above-entitled action having been regularly brought on to be heard by the court, a jury having been by stipulation of the parties to the said action duly waived, and the parties hereto, by their respective attorneys, having stipulated all the facts bearing upon the issues herein, and the defendants to this action having duly stipulated and agreed in writing that if the plaintiff should prevail the defendants and each of them waive all claim or right of recovery against plaintiff by counter-claim or otherwise for the value of said buildings and improvements or either or any of them, and the said cause having been argued by Pierce & Austin on behalf of the plaintiff, and by James B. Kerr and J. B. McNamee on behalf of defendants, and the court after hearing and considering the evidence introduced and the arguments of counsel and the cause having been submitted to the court for its decision, the court now finds the following facts:

Findings of Fact.

I.

That the Northern Pacific Railroad Company is a corporation created, organized, and existing under and by virtue of an act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound on the Pacific coast, by the north-
75 ern route," and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

That by the terms and provisions of said act said corporation was authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, beginning at a point on Lake Superior in the State of Minnesota or Wisconsin, thence westerly by the most

eligible railroad route as should be determined by said company, within the territory of the United States, on a north line of the 45th degree of latitude to some point on Puget's sound, with a branch, via the valley of the Columbia river, to a point at or near Portland, in the State or Oregon.

By the third section of said act lands were granted to said railroad company as follows:

"That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, * * * every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of the said sections or parts of sections shall have been granted, sold,
reserved, occupied by homestead settlers, or pre-empted or
76 otherwise disposed of, other lands shall be selected by the
company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.

Provided, further, that all mineral lands be, and the same are hereby excluded from the operations of this act, and — lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road, may be selected as above provided: And further provided, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal."

By section 4 of said act it was further provided that whenever said company should have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated the President of the United States should appoint three commissioners to examine the same, and if it should appear that such twenty-five consecutive miles of said road and telegraph line had been completed in a good, substantial, and workmanlike manner, as in all other respects required by said act, the commissioners should so report to the President of the United States and patents of land, as aforesaid, should be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road, and that whenever, from time to time, twenty-five additional consecutive miles should have been constructed, completed, and in readiness, as aforesaid, and verified by said commissioners to the President of the United States, then patents should be issued to

said company conveying the additional sections of land, as aforesaid, and so on as fast as every twenty-five miles of said road should be so completed.

By section 6 of said act it was further provided as follows:

"That the President of the United States shall cause the
77 lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or pre-emption before or after they are surveyed, except by said company as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, eighteen hundred and sixty-two, shall be, and the same are hereby extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a less price than two dollars and fifty cents per acre when offered for sale."

II.

That within two years after the passage of said act the said railroad company duly accepted the terms, conditions, and impositions thereof, in writing, under its corporate seal, executed pursuant to the directions of its board of directors first had and obtained, and on December 29, 1864, served with such acceptance on the President of the United States.

III.

That thereafter, by a joint resolution approved May 31, 1870, entitled "A resolution of Congress authorizing the Northern Pacific Railroad Company to issue bonds for the construction of its road and to secure the same by mortgages and for other purposes," it was resolved and provided that in the event of there not being in any State or Territory in which said main line or branch might be located at the time of the final location thereof the amount of
78 lands granted by said company within the limits prescribed by its charter the said company should be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States and designated by odd numbers in such State or Territory within ten (10) miles on each side of said road beyond the limits prescribed in said charter as would make up the deficiency in said main line or branch (except mineral or other lands as excepted in the charter of said company by said act of Congress approved July 2, 1864) to the amount of the lands that would have been granted, sold, reserved, occupied by homestead settlers, pre-empted or otherwise disposed of, subsequent to the passage of said act of July 2, 1864.

IV.

That prior to the 30th day of March, 1872, the said railroad company had duly located the general route of its road from the Red River of the North to the Missouri river, in the then Territory of Dakota, now State of North Dakota, and also prior to the said 30th day of March, 1872, the said railroad company transmitted a diagram or map showing the said designated route of said road to the Commissioner of the General Land Office; that said diagram or map was duly filed in the office of the said Commissioner, and on the 30th day of March, 1872, said Commissioner of the General Land Office transmitted a prepared diagram showing the designated route of the said railroad company under act of July 2nd, 1864, to the register and receiver of the United States land office at Pembina, Dakota Territory, copy of the letter of transmittal being as follows, to wit:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *March 30th*, 1872.

"Register and receiver, Pembina, Dakota Ter.

"GENTLEMEN: I transmit herewith a diagram showing the
79 designated route of the Northern Pacific railroad under act of July 2, 1864, and, by direction of the Secretary of the Interior, you are directed to withhold from sale or location, pre-emption or homestead entry, all the surveyed and unsurveyed odd-numbered sections of public lands falling within the limits of forty miles as designated on this map.

"You will also increase in price to $2.50 per acre the even-numbered sections within those limits and dispose of them at that ratability and under the pre-emption and homestead laws only, no private entry of the same being admissible until these lands have been offered at the increased price.

"This order will take effect from the date of its receipt by you, and you are requested to acknowledge, without delay, the time of its receipt.

"Very respectfully,
"(Signed) W. W. CURTIS,
"*Acting Commissioner.*"

Receipt ack'g'd April 22, 1872. 1, 97526.

That on the 22nd day of April, 1872, said map or diagram was duly filed in the United States land office at Pembina, Dakota Territory, and receipt of such letter duly acknowledged by the register and receiver of said land office to the Commissioner of the General Land Office, and the said register and receiver of the Pembina land office made and designated upon the records of the said office the notations in accordance with the said map or diagram; that the tract hereinafter described and involved in this action was coterminous with said line of general route so located prior to March 30th, 1872, as aforesaid.

V.

That said railroad company duly proceeded with the work of surveying and definitely locating the line of its said railroad; that prior to May 24, 1873, the said company had definitely located
80 that portion of the line of its road extending from the Red River of the North to Missouri river, in the Territory of Dakota, now State of North Dakota; that on the 24th day of May, 1873, the said company transmitted a map of that portion of its said line of railroad so definitely located to the Secretary of the Interior, and that on May 26th, 1873, the Secretary of the Interior transmitted said map to the Commissioner of the General Land Office with the following letter, to wit:

"DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *May* 26, 1873.

"SIR: I transmit herewith for appropriate action map of definite location of the Dakota division of the Northern Pacific railroad between the Red and the Missouri rivers, received on the 24th instant, with letter of the same date from W. K. Mendenhall, Esq., att'y for the company, in this city.

"Very respectfully, your ob't servant,

"C. DELANO, *Secretary.*

"Hon. Willis Drummond, Comm'r G. L. O."

That on the same day, to wit, May 26, 1873, said map was duly filed in the office of the Commissioner of the General Land Office; that upon the filing of said map or plat the said Commissioner made and designated upon the maps and records of his said office the limits of the lands granted by Congress to said railroad company to aid in the construction of the said railroad coterminous with the said line, as shown on said plat, namely, forty (40) miles and fifty (50) mile limits on each side of said line of definite location, the first named being the lands in place, and hereafter, for the purpose of convenience, being designated the place lands; the second being the limits of the indemnity provided for in the act of Congress approved July 2, 1864, hereafter, for convenience, designated the indemnity lands; thereafter the Commissioner of the
81 General Land Office, under the direction of the Secretary of the Interior, transmitted to the United States district land officers for the district through which said line of definite location extended, and within which such place and indemnity lands fell, a diagram showing that portion of the line of said railroad so definitely fixed, as aforesaid, with the place and indemnity limits indicated thereon, and transmitted with said diagram the following letter of instructions, to wit:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *June 11th*, 1873.

"Register and receiver, Pembina, D. T.

"GENTLEMEN: The Northern Pacific Railroad Company filed in this office on the 26th ultimo, in accordance with the law, a map of the definite location of their road from the Red River of the North to the Missouri river in Dakota Territory. I have accordingly prepared a diagram, which is herewith transmitted, showing the forty and fifty mile limits of their land grant along said line, with also the forty-mile limits of withdrawal ordered by my letter to you of March 30th, 1872, upon a designated line, and you are hereby directed to withhold from sale or entry all the odd-numbered sections, both surveyed and unsurveyed, falling within those limits, and to hold subject to pre-emption and homestead entry only the even-numbered sections at $2.50 per acre within the forty-mile limits, and $1.25 per acre between the forty and fifty mile or indemnity limits.

"The even-numbered sections within the forty-mile limits of former withdrawal now falling without the present corrected limits will be reduced in price to $1.25 per acre.

82 "The right of the road attached to both surveyed and unsurveyed lands from the date of filing the map of definite location in this office, to wit, May 26, 1873, from which date also the even-numbered sections became double minimum.

"Be pleased to acknowledge the date of the receipt of this letter.

"Very respectfully, W. W. CURTIS,
"*Acting Commissioner.*"

That said letter and diagram were duly received and filed in the said district land office at Pembina, that being the district within which said lands were situate, June 24, 1873.

The northeast quarter (N. E. ¼) of section thirteen (13), in township one hundred and thirty-two (132) north of range fifty-seven (57) west of the fifth principal meridian, North Dakota, was coterminous with said line of definite location so fixed May 26, 1873, as aforesaid, and was more than forty, but within fifty, miles thereof, being within the indemnity limits, and was, at the date of said grant, at the time said line was definitely fixed and the plat thereof filed in the office of the Commissioner of the General Land Office, and at the time said above letter of the acting Commissioner, dated June 11th, 1873, was written, and at the time it was received at the said United States district land office at Pembina, and at all times herein mentioned, except as otherwise hereinafter set forth, public land, to which the United States had full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, and was and is non-mineral in character, and that said alleged order of withdrawal remained in force until revoked under the order of the Secretary of the Interior of August 15, 1887.

VI.

That said Northern Pacific Railroad Company prior to 1885
83 duly definitely located its said line of railroad and filed the maps thereof in the office of the Commissioner of the General Land Office, which said maps were duly approved by the Secretary of the Interior, and thereafter said company duly constructed and completed that portion of its said railroad and telegraph line on, over, and along said line of definite location extending from Lake Superior to Puget sound, as aforesaid (both main and branch line), in all respects as a first-class railroad and telegraph line that as fast as portions of said railroad and telegraph lines equal to or exceeding twenty-five (25) miles in length were so constructed, as aforesaid, they were examined by commissioners appointed by the President of the United States, and by said commissioners were found and reported to have been constructed in a good, substantial, and workmanlike manner, in all respects as required by said act of Congress; that such reports were duly accepted and approved by the President of the United States, as provided by said act of Congress approved July 2, 1864.

That the portion of said railroad and telegraph line extending on, over, and along said line of definite location from the Red River of the North to the Missouri river was so completed prior to November, 1873; that the President of the United States having appointed three commissioners to examine the same, the said commissioners so examined it and, on the 24th day of November, 1873, reported to the Secretary of the Interior that said portion of said railroad and telegraph line had been constructed in a good, substantial, and workmanlike manner, in all respects as required by the act of Congress; that thereafter, to wit, November 28, 1873, the Secretary of the Interior transmitted said report to the President of the United States with the following recommendations: "The commissioners in their report represent that this portion of the
84 road has been (in the main) constructed in a first-class manner. I would therefore recommend the acceptance of the same and the issuance to the company of patents for lands due on account of the completion thereof;" that said report was accepted and said recommendations approved by the President of the United States December 1, 1873.

VII.

That on March 19, 1883, the said Northern Pacific Railroad Company filed in said land office at Fargo, Dakota, being the district land office of the United States for the district embracing the lands contained in said list, a certain list of selections under its said grant embracing the said northeast quarter of section 13, township 132 north of range 57 west of the fifth principal meridian, claiming said tract under said act of July 2, 1864, and paid to the receiver of said office the fees required by law; that said tract was within the said Fargo United States land district and was within the indemnity limits of the said grant to the said company. The register and re-

ceiver of said land district accepted and filed said list and attached thereto the following certificate:

"UNITED STATES LAND OFFICE,
"FARGO, DAKOTA, *April* 9, 1883.

"We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Northern Pacific Railroad Company under the grant to the said company by acts of Congress approved July 2, 1864, and joint resolution approved May 31, 1870, and selected by said Northern Pacific Railroad Company, by Charles B. Lamborn, the duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct; and we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States and within the limit of fifty miles on each side, and that the same
85 are not nor is any part thereof returned and denominated as mineral lands or lands not claimed as swamp lands, nor is there any homestead, pre-emption, State, or other valid claim to any portion of said lands on file or record in this office.

"We further certify that the foregoing list shows an assessment of the fees payable to us allowed by the act of Congress approved July 1, 1864, and contemplated by the circular of instructions dated January 24, 1867, addressed by the Commissioner of the General Land Office to registers and receivers of the United States land offices, and that the said company have paid to the receivers, on March 19, 1883, the full sum of five thousand four hundred and eighty-seven and $\frac{29}{100}$ dollars in full payment and discharge of said fees.

"HORACE AUSTIN, *Register.*
"E. C. GEAREY, *Receiver.*"

That on May 28, 1883, the Secretary of the Interior issued the following instructions of the department, to wit:

"The Commissioner of the General Land Office.

"SIR: It is my desire to open for settlement as speedily as possible all the lands within the indemnity limits of the grant to the Northern Pacific Railroad Company not actually required to supply the lands lost in the place within the granted limits.

"The grant should be adjusted at the earliest possible time, that the orders of withdrawal may be vacated without unreasonable delay, as indicated in my letter of the 17th instant. The unparalleled demand for the lands for actual settlement by great numbers of persons, not only from foreign countries, but from the older States, seeking homes under the settlement laws along the line and within the vicinity of the Northern Pacific grant requires for the best interests of the country and for all parties concerned that the withdrawals should not be maintained any longer than is actually
86 necessary for the adjustment of the guaranteed rights of the company.

"In order to facilitate the work of making selections, I think you should instruct the local officers that when clear lists of selections free from conflict or other objection, are filed with the district officers and approved by them, said selections should at once be marked upon their books and forwarded for final examination, leaving the ascertainment of the lands lost in place *of* your office, instead of requiring preliminary lists of such lost lands, together with the indemnity lands, tract for tract, from the company, as heretofore.

"I am satisfied that the work of adjusting the grant will go forward much more rapidly under this plan than under the former practice.

"Very respectfully, H. M. TELLER, *Secretary.*"

That on August 4, 1885, the Commissioner of the General Land Office issued the following circular of instructions, approved by the Secretary of the Interior, to wit:

"Before admitting railroad indemnity selections in any case you will require preliminary lists to be filed, specifying the particular deficiencies for which indemnity is claimed. You will then carefully examine your records, tract by tract, to ascertain whether the loss to the grant actually exists as alleged. You will admit no indemnity selection without a proper basis therefor. If you are in doubt whether the company is entitled to indemnity for losses claimed, you will transmit the preliminary lists to this office for instructions, and will not place the selections on record until directed to do so.

"Where indemnity selections have heretofore been made without specifications of loss you will require the companies to designate the deficiencies for which such indemnity is to be applied
87 before further selections are allowed. The selecting agent applying to make indemnity selections must state in his affidavit attached to the list presented that the specific losses for which indemnity is claimed are truly set forth and described in said list, and that said losses have not heretofore been indemnified in any manner.

"Where deficiencies exist for which indemnity is allowed by law the lieu selections must be made from vacant unappropriated land within proper sections and limits nearest the granted sections in which the loss occurred. You will be careful to see that this rule is strictly complied with, and will reject all selections not made in conformity thereto.

"Approved.

"L. Q. C. LAMAR, *Secretary.*"

That on October 12, 1887, the Northern Pacific Railroad Company filed in said United States district land office at Fargo a list designating an amount of lands equal to those selected in said list of March 19, 1883, claimed to have been lost and excepted from said grant and within the place limits of said grant as defined on definite location and as a basis for said selections.

That thereafter, on February 23, 1892, the said Northern Pacific

Railroad Company duly filed in said United States district land office at Fargo a rearranged list, in which it designated the lands theretofore selected, as aforesaid, in said list filed March 19, 1883, and therein set opposite each specific description of land so selected the description of a tract of equal area lost from its grant in place and in lieu of which such indemnity lands had been selected and therein set opposite the said northeast quarter of section 13, township 132, range 57, and as a basis for the selection of the same the southeast quarter of section 21, township 44 north of range 9 west of the fourth principal meridian, Wisconsin; that said last-described
88 tract was coterminous with and within twenty miles of the portion of said line of said Northern Pacific railroad as definitely fixed extending through the State of Wisconsin, and was at the date of the grants to the Northern Pacific Railroad Company and at the time the line of said railroad coterminous therewith was definitely fixed and a plat thereof filed in the office of the Commissioner of the General Land Office, as aforesaid, reserved and appropriated by the United States to aid in the construction of a certain line of railroad under the provisions of an act of Congress approved June 3, 1856, entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State," and was at the date of said act of June 3, 1856, and at the time of the definite location of the road in aid of which said act was passed public land and free from pre-emption and other claims and rights, and that the railroad provided for by the said act of June 3, 1856, was definitely located prior to the definite location of the Northern Pacific railroad in Wisconsin; that at the date of said selection by said company of said northeast quarter of section 13, township 132, range 57, there were no filings or entries or applications to make filings or entry for said tract other than the filing and entry of said plaintiff as herein set forth, and that said selection has never been approved by the Secretary of the Interior except as herein set forth, and neither the Department of the Interior nor the Secretary of the Interior nor any department of the Government has ever made certification that the said company was entitled to the same or to letters patent for the same, but was cancelled by said Secretary in his decision set out in the eleventh finding hereof; that, except as herein set forth, letters patent or any evidence of title whatsoever for said tract has never been issued or made to said company
89 or to any person or persons whomsoever except to this plaintiff.

VIII.

That under date of May 2, 1896, the Commissioner of the General Land Office made the following certificate, to wit:

"I, S. W. Lamoreaux, Commissioner of the General Land Office, do hereby certify that I have caused examination to be made of the records of this office relative to the grant to the Northern Pacific Railroad Company under acts of Congress approved July 2, 1864, and May 31, 1870, and certify that said records show that the total area of land excepted from and lost to said grant within its primary

limits amounts to 10,624,746.27 acres, and that there are within the first indemnity limits not to exceed 7,065,523.49 acres which are or will be when surveyed available for selection to satisfy the losses above referred to, thus leaving a known deficiency of 3,559,222.78 acres in said grant which cannot be satisfied from the limits as now recognized by this office.

"(Signed) S. W. LAMOREAUX,
"*Commissioner.*"

IX.

That the said southeast quarter of section 21, township 44 north of range 9 west of the 4th principal meridian, Wisconsin, so assigned as a basis for the selection of said northeast quarter of section 13, in township 132 north of range 57 west, lies east of Superior city, in the State of Wisconsin; that on November 14, 1895, the Secretary of the Interior rendered a decision, wherein he held that said act of Congress of July 2, 1864, and the acts supplemental thereto and amendatory thereof did not grant to said Northern Pacific Railroad Company any lands east of Superior city, in the State of Wisconsin, and that said company is not entitled under said acts or any of them to take lands east of Superior city;
90 that said Secretary in said decision further ruled as follows:

"I further learn upon inquiry at your office that the lands east of Superior city were made the basis of the selection of a large quantity of lands from the indemnity belt of the company's grant in North Dakota. These selections having been made some while ago, many, if not all, of the lands selected have perhaps been sold by the company.

"The previous action of this department giving color to the company's right to a grant east of Superior city and the application of the rule that the indemnity lands should be selected nearest of those lost were the probable causes for the specification of these lands as a basis for the selections referred to.

"In view thereof I have to direct that the company be allowed sixty days from notice of this decision within which to specify a new basis for any of its indemnity selections avoided by this decision, and that during that period no contests against such selections where the charge is that the basis was made of lands east of Superior city or application to enter under the settlement laws will be received."

That within sixty days from the notice of said decision and on November 26, 1895, the said railroad company, in compliance with said order, specified as a basis for its said selection *of* the said northeast quarter, section 13, township 132 of range 57: the northeast quarter of section 1, in township 3 north of range 33, in the State of Montana, and duly filed said specification on said date in the office of the Commissioner of the General Land Office, in accordance with the said direction of the Secretary of the Interior; that said last-described tract was at the date of said grant to said company and at the date of the definite location of its line of railroad oppo-

site thereto within the Crow Indian reservation; that said
91 tract was at the date of said grant and of said definite location within forty miles of the line of said railroad as definitely located through said State, then Territory, of Montana; that in so assigning said tract as a basis for said selection, said railroad company, by its land commissioner, William H. Phipps, filed therewith, in the office of said commissioner, the following statement, to wit:

"Whereas the honorable Secretary of the Interior did, on the fourteenth day of November, 1895, render a decision wherein he held that the Northern Pacific Railroad Company had no grant of lands opposite to and coterminous with its railroad between Superior and Ashland, and that therefore the designation of losses between those points as a basis for the selection of indemnity land elsewhere was invalid; and

"Whereas the Secretary of the Interior, in said decision of November 14, 1895, did direct that the said Northern Pacific Railroad Company be allowed sixty days from notice of said decision within which to designate other losses within its grant in lieu of those within the points theretofore assigned; and

"Whereas the Northern Pacific Railroad Company has heretofore sold a large portion of its indemnity lands, the title to which is affected by the decision of the Secretary of the Interior of November 14, 1895, hereinbefore referred to:

"Now, therefore, the said Northern Pacific Railroad Company, because of said decision of the Secretary of the Interior, and to facilitate the adjustment of the title to said indemnity lands so affected by said decision, reserving and saving all rights of the company heretofore acquired and expressly maintaining and insisting that all provisions of the act of July 2, 1864, for its benefit are
in all respects in full force and operation as far east as Ash-
92 land, the Northern Pacific Railroad Company, for the sole purpose of protecting and saving the titles of its purchasers to indemnity lands affected by the decision of the Secretary of the Interior of November 14, 1895, hereby submits, pursuant to the directions of said decision, a list of losses to be substituted for those hereinbefore embraced in Fargo list No. 6 as originally filed on March 19, 1883, and rearranged February 23, 1892.

"And the said company prays the approval of said amended list and the prompt issuance of patent therefor.

"WM. H. PHIPPS,
"*Land Commissioner, N. P. R. R. Co.*"

That said tract so assigned as a basis for the selection of said northeast quarter of section 13, in township 132 north of range 57, was excepted from said grant to said company by reason of being included in said Indian reservation, and said company was entitled to select indemnity therefor.

X.

That on or about the 10th day of April, 1882, plaintiff, being qualified to hold and acquire land under the pre-emption laws of the United States, settled upon and improved the said northeast quarter of section 13, in township 132 north of range 57 west of the fifth principal meridian, in the county of Sargent, State of North Dakota, then the Territory of Dakota, with the intention of entering the same under the provisions of the act of Congress approved September 4, 1841, and the acts supplemental thereto and amendatory thereof, authorizing the entry and purchase of public lands of the United States by the citizens thereof and those who have declared their intention to become such citizens, and that on the 2nd day of November, 1882, he duly presented to the United States land office at Fargo, Dakota Territory (now State of North Dakota), a declaratory statement, No. 11747, for said tract, as provided by law,
93 which was duly received, filed, and placed upon the records of the said land office.

XI.

That plaintiff resided upon and cultivated said land, as required by law, from the said 10th day of April, 1882, to the 4th day of April, 1883, at which latter date he submitted final proof therefor as provided by law, and then and there duly tendered the Government price for said tract, together with all the required fees, to the said land office, and that said final proof was then and there rejected by the register and receiver of the United States district land office, they assigning as a reason therefor that the described land had been withdrawn from entry under the said act of July 2, 1864, and the acts of Congress supplemental thereto and amendatory thereof; that plaintiff duly appealed from the said decision of the district land office to the Commissioner of the General Land Office, who, on the 5th day of October, 1883, affirmed the decision of the district land office; that the plaintiff had no notice whatsoever of the said decision of October, 1883, until on or about the 1st day of August, 1888, at which date he made application for a review thereof by the Commissioner of the General Land Office, and thereupon that officer, on the 25th day of September, 1888, rendered the following decision, to wit:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *Sept.* 25, '88.

"Register and receiver, Fargo, Dakota.

"GENTLEMEN: I have considered the application of Fred Hewitt for a review of office decision of October 5, 1883, affirming your action in rejecting his final proof for N. E. ¼, section 13, township 134 N., range 57 W.

94 "Said tract is within the 50-mile indemnity limit of the withdrawal for the benefit of the Northern Pacific R. R. Co., ordered by letter from this office, dated June 11, 1873, received at

the local office then at Pembina, June 24, 1873. The township was surveyed July 12 to 27, 1882, and the plat of survey was filed in your office on the 13th day of October following; the whole of said section was selected by the agent of the railroad company March 19, 1883, per list No. 6.

"The records here show that Hewitt presented his final pre emption proof at your office, which was rejected for conflict with the withdrawal and selection above recited, and from this action Hewitt appealed.

"Your decision was confirmed by this office as being in accordance with the instructions contained in the circular approved May 26, 1883.

"Hewitt asks for a review of the above decision on the ground that he never received any notice thereof until recently informed by an attorney at Washington.

"The final proof submitted by applicant shows that he is a native-born citizen, over 21 years of age, and a qualified pre-emptor, July 10th, 1882; his improvements consisted of a frame house, 16 x 16 feet, stable 10 x 12 feet, and 20 acres of ground broken, the value of the same being estimated at $350. This declaratory statement was presented for filing within the time prescribed by law and was accepted by your office, a receipt issuing therefor.

"Under the late decision of the Hon. Secretary of the Interior in the case of The Northern Pacific Railroad Company *vs.* Guilford Miller, it is held that the withdrawal of indemnity lands for the benefit of said company was prohibited by the sixth section of the granting act, and, being in violation of the law and without
95 effect, was not operative to defeat the rights of *bona fide* adverse claimants under the general laws of the United States who settled on lands within such limits prior to the time when selection by the railroad had been made.

"In view of the fact that claimant established his actual residence and had permanent improvements upon the land prior to the Government survey or selection by the railroad company, his claim was superior thereto, and hence office decision of October 5, 1883, is set aside, Hewitt's final proof admitted, and the selection by the railroad company held for cancellation.

"Advise all parties in interest promptly of this decision and that 60 days will be allowed for appeal.

"The resident attorneys for the railroad company will be notified by letter from this office.

"Very respectfully, S. M. STOCKSLAGER,
"Commissioner."

That thereafter the said Northern Pacific Railroad Company duly appealed from said decision of the Commissioner of the General Land Office to the Secretary of the Interior, and said Secretary of the Interior on August 11, 1894, made and rendered his certain decision in the following words and figures, to wit:

"NORTHERN PACIFIC R. R. Co.
vs.
FRED HEWITT.

"DEPARTMENT OF THE INTERIOR,
"WASHINGTON, *Aug.* 11, 1894.

"The Commissioner of the General Land Office.

"SIR: I have considered the appeal of the Northern Pacific R. R. Co. from your office decision of September 25, 1888, holding for cancellation its indemnity selection of the N. E. ¼, sec. 13, T. 132 N., R. 57 W., Fargo, North Dakota, on account of the prior claim
96 of Fred Hewitt under his pre-emption filing upon which he has submitted proof.

"Your office decision is based upon the holding that prior to selection lands within said limits are subject to appropriation as other public lands, which is in harmony with the recent decision of this department in the case of Jennie L. Davis *vs.* Northern Pacific R. R. Co. (19 L. D.), and your office decision is therefore affirmed and the company's selection will be cancelled.

"Herewith I return the papers.

"Very respectfully, HOKE SMITH, *Secretary.*"

That on June 22, 1895, pursuant to said decision of the Secretary of August 11, 1894, and based upon said pre-emption final proof so made, as aforesaid, by said plaintiff, letters patent of the United States were duly issued under the great seal of the United States purporting to convey to said plaintiff the said northeast quarter of section 13, township 132 of range 57, North Dakota.

XII.

That from the said 10th day of April, 1882, to the 21st day of June, 1884, plaintiff resided upon and was in actual possession of said tract and every portion thereof and had valuable improvements thereon.

XIII.

That on June 21st, 1884, and while plaintiff was so in possession of said land, the said defendant, Emil Schultz, made and entered into a certain contract in writing with the said railroad company, by the terms whereof said railroad company agreed, in consideration of twelve hundred dollars ($1,200), to sell and convey the said northeast quarter of section 13, township 132, range 57, to the
97 said defendant, Emil Schultz, and the said Emil Schultz then and therein agreed to pay to the said company the said sum therefor; that upon the making of said contract the said Emil Schultz entered upon said tract and ousted said plaintiff from the actual possession thereof and took up his residence thereon, and has since continued to reside thereon and cultivate and improve the same; that the said defendant, Schultz, having paid to the said railroad company the consideration agreed by him to be paid to said company for said land in said contract of sale, as aforesaid,

the said company on or about December 18, 1889, made, executed, and delivered its certain indenture of deed with full covenants of warranty, whereby it conveyed to the said defendant, Schultz, the said northeast quarter of section 13, in township 132 north of range 57 west.

XIV.

That the plaintiff has not at any time made a conveyance or attempted conveyance of said premises, but now holds title thereto, which he received from the United States as hereinbefore set forth. The said defendant, Schultz, has not at any time made a conveyance of the said premises.

XV.

That the value of the rents, issues, and profits of said tract during the time of its occupancy by said Schultz, as aforesaid, is the sum of seven hundred and fifty (750) dollars.

XVI.

That the value of the improvements made upon said tract by said defendant, Schultz, is the sum of six hundred (600) dollars, and the value of the land without the improvements is the sum of eight hundred (809) dollars.

XVII.

That the said defendant, Friederika Schultz, is the wife of
98 the said defendant, Emil Schultz.

XVIII.

That none of the buildings or improvements made or placed upon the tract involved in this action, to wit, the northeast quarter (N. E. ¼) of section thirteen (13), township one hundred thirty-two (132) north of range fifty-seven (57) west, by the defendants or either of them were made or placed thereon while the defendants or either of them were holding under color of title, adversely to the claim of plaintiff, in good faith.

XIX.

That the tract of land involved in the action entitled Grandin *vs.* Le Bar, as reported in 57 N. W. Rep., 241, and the pages following, was selected by the said Northern Pacific Railroad Company at the same time and included in the same list of selections as the tract involved in this action, and the foregoing certificate, dated April 9th, 1883, is appended to the said list of selections, included in which list is the tract involved in the case of Grandin *vs.* La Bar aforesaid.

As conclusions of law from the foregoing facts, the court now hereby finds and decides:

Conclusions of Law.

I.

That plaintiff is the owner in fee-simple of the tract involved in this action, to wit, the northeast quarter (N. E. ¼) of section numbered thirteen (13), in township numbered one hundred thirty-two (132) north of range numbered fifty-seven (57) west of the fifth principal meridian.

II.

That defendants or either of them or any persons claiming or to claim said premises or any part thereof under them or either of them have no estate or interest in or right or title to or lien upon said premises or any part thereof.

99

III.

That the order of withdrawal made by the acting Commissioner of the General Land Office on June 11th, 1873, was made in violation of law and without effect and void in so far as it relates to the tract of land in controversy.

IV.

That the Northern Pacific Railroad Company has never made a valid selection of the tract involved herein for indemnity purposes.

V.

That defendants wrongfully and unlawfully withhold the possession of said premises from plaintiff, and that plaintiff is entitled to possession of said premises and every part thereof.

VI.

That plaintiff is entitled to judgment against defendants for the sum of seven hundred fifty ($750) dollars, the said value of the rents, issues, and profits of said premises.

VII.

That plaintiff is entitled to judgment against defendants for his costs and disbursements in this action, to be taxed and allowed by the clerk of this court.

Let judgment be entered accordingly.

By the court:

W. S. LAUDER, *Judge.*

Dated October 4th, 1897.

To the foregoing conclusions of law and to each thereof and to the whole thereof the defendant, by his counsel, duly excepts; which

exceptions are hereby allowed and the same are ordered brought upon and made part of the record herein.

By the court:

W. S. LAUDER, *Judge.*

October 4th, 1897.

100 It is ordered that all further proceedings herein are hereby stayed for sixty days, to enable defendant to take such further proceedings as he may be advised by his counsel.

By the court:

W. S. LAUDER, *Judge.*

October 4th, 1897.

101 STATE OF NORTH DAKOTA, }
County of Sargent. }

District Court.

FRED HEWITT, Plaintiff, }
vs. }
EMIL SCHULTZ and FREDERIKA SCHULTZ, Defendant-. }

Now comes the defendants, by their attorneys, Ball, Watson & Maclay, James B. Kerr and J. B. McNamee, and except to all the findings of fact and conclusions of law herein for the reason and upon the ground that said findings of fact and conclusions of law were prepared by the attorney for the plaintiff and signed by the court without notice to the attorneys for said defendants and without a submission to said defendants of a copy thereof or a copy of the proposed findings of fact prior to the signing thereof.

Defendants further except to the first conclusion of law on the ground that the same is not sustained by the evidence and the findings of fact therein.

Defendants except to the second conclusion of law on the ground that the same is not sustained by the evidence and the findings of fact therein.

Defendants in like manner except to the third conclusion of law upon the ground and for the reason that the same is not sustained by the evidence or the findings therein and is contrary to the findings and contrary to the evidence.

Defendants in like manner except to the fourth conclusion of law upon the ground that the same is not sustained by the evidence of findings herein, and that the same is contrary to the law and contrary to the evidence and contrary to the findings herein.

102 Defendants in like manner except to the fifth conclusion of law upon the ground that the same is not sustained by the evidence or findings herein, and that the same is contrary to the law, contrary to the evidence, and contrary to the findings herein.

Defendants in like manner except to the sixth conclusion of law upon the ground that the same is not sustained by the evidence or findings herein, and that the same is contrary to law, contrary to the evidence, and contrary to the findings herein.

Defendants in like manner except to the seventh conclusion of law upon the ground that the same is not sustained by the evidence or findings herein, and that the same is contrary to law, contrary to the evidence, and contrary to the findings herein.

BALL, WATSON & MACLAY,
JAMES B. KERR,
J. B. McNAMEE,
Attorneys for Defendants.

103 STATE OF NORTH DAKOTA, *County of Sargent,* } *ss:*

In District Court, Fourth Judicial District.

FRED HEWITT, Plaintiff,
vs.
EMIL SCHULTZ and FREDERIKA SCHULTZ, Defendants.

Judgment and Decree.

The above-entitled action having been regularly brought to be tried and heard by the court, a jury having been by stipulation of all the parties to the said action duly waived, and after hearing the argument of counsel and duly considering all the evidence submitted, and the said cause having been duly submitted to the court for determination, and the court having duly made and filed its findings of fact and conclusions of law, and the decision herein in writing having been duly rendered and filed by the court, wherein and whereby judgment was ordered for the said plaintiff and against the said defendants for the relief prayed for in the plaintiff's complaint, together with the costs and disbursements of this action:

Now, therefore, on motion of Pierce & Austin, attorneys for plaintiff, it is hereby adjudged, determined, and decreed:

I.

That plaintiff is the owner in fee-simple of the tract involved in this action, to wit, the northeast quarter (N. E. ¼) of section numbered thirteen (13), in township numbered one hundred thirty-two (132) north of range fifty-seven (57) west of the fifth principal meridian, situated in the county of Sargent and State of North Dakota.

II.

That defendants or either of them or any persons claiming
104 or to claim said premises or any part thereof under them or either of them have no estate or interest in or right or title to or lien upon said premises or any thereof.

III.

That defendants wrongfully or unlawfully withhold the possession of said premises from plaintiff, and that plaintiff is entitled to possession of said premises and every part thereof, and that plain-

tiff have and recover possession of said premises and every part thereof.

IV.

That plaintiff have and recover of and from the defendants, Emil Schultz and Friederika Schultz, the sum of seven hundred fifty (750) dollars, the value of the rents, issues, and profits of the said premises, together with the costs and disbursements of this action, taxed and allowed at thirty-three (33) and $\frac{40}{100}$ dollars, making a total sum of seven hundred eighty-three (783) and $\frac{40}{100}$ dollars.

Witness the Hon. W. S. Lauder, judge of the district court within and for said county and State, and the seal of the court, at Forman, North Dakota, this 31st day of January, 1898.

O. B. JOHNSON,
[SEAL.] *Clerk of District Court, Sargent County, North Dakota.*

105 STATE OF NORTH DAKOTA, }
County of Sargent. }

District Court.

FRED HEWITT, Plaintiff,
vs.
EMIL SCHULTZ and FREDERIKA SCHULTZ, Defendants.

Stipulation.

It is hereby stipulated and agreed by and between the parties hereto, by their respective attorneys, that the following statement of the case may be signed and settled by the Honorable W. S. Lauder without notice to either party.

THOMAS A. CURTIS,
PIERCE & AUSTIN,
Attorneys for Plaintiff.
BALL, WATSON & MACLAY,
JAMES B. KERR,
J. B. McNAMEE,
Attorneys for Defendants.

2, 3, '98, signed.

106 STATE OF NORTH DAKOTA, }
County of Sargent. }

District Court.

FRED HEWITT, Plaintiff,
vs.
EMIL SCHULTZ and FREDERIKA SCHULTZ, Defendants.

Statement of Case.

Be it remembered that the above-entitled action having come on for trial before this court, the Honorable W. S. Lauder, district judge, presiding without a jury, the parties having stipulated in writing

that a jury be waived, the plaintiff appearing by T. A. Curtis and Pierce & Austin, his attorneys, and the defendants appearing by Ball, Watson & Maclay, James B. Kerr, and J. B. McNamee, their attorneys, and the said parties, by their attorneys, having stated that they were ready to try the issues made by the pleadings in the said action, did then and there present and file a stipulation in writing setting forth all the facts and evidence touching the issues made by their said pleadings, and did then and there, in open court, agree and consent to submit the said issues to the said court for determination upon the said stipulation and upon all the files in said action, the said stipulation being as follows, to wit:

STATE OF NORTH DAKOTA, }
County of Sargent. }

District Court.

FRED HEWITT, Plaintiff,
vs.
EMIL SCHULTZ and FREDERIKA SCHULTZ, Defendants. }

107 *Stipulation.*

It is hereby stipulated by and between the parties hereto that the following are and shall constitute the facts and all of them, except as herein provided, in the above-entitled action, and shall constitute the evidence of the same:

1. That the Northern Pacific Railroad Company is a corporation created, organized, and existing under and by virtue of an act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from Lake Superior to Puget's sound, on the Pacific coast, by the northern route," and the acts and joint resolutions of Congress supplemental thereto and amendatory thereof.

That by the terms and provisions of said act said corporation was authorized and empowered to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph line, with the appurtenances, beginning at a point on Lake Superior in the State of Minnesota or Wisconsin, thence westerly by the most eligible railroad route as should be determined by said company within the territory of the United States, on a line north of the 45th degree of latitude, to some point on Puget's sound, with a branch, via the valley of the Columbia river, to a point at or near Portland, in the State of Oregon.

By the third section of said act lands were granted to said railroad company as follows:

"That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, * * * every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alter-

nate sections per mile, on each side of said railroad line, as
108 said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever prior to said time, any of the said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. * * *

Provided further, that all mineral lands be, and the same are hereby, excluded from the operation of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd numbered sections, nearest to the line of said road, may be selected as above provided: And provided further, that the word 'mineral,' when it occurs in this act, shall not be held to include iron or coal."

By section 4 of said act it was further provided that whenever said company should have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated the President of the United States should appoint three commissioners to examine the same, and if it should appear that such twenty-five consecutive miles of said road and telegraph line had been completed in a good, substantial, and workmanlike manner, as in all other respects required by said act, the commissioners
should so report to the President of the United States, and
109 patents of lands, as aforesaid, should be issued to said company confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road, and that whenever, from time to time, twenty-five additional consecutive miles should have been constructed, completed, and in readiness, as aforesaid, and verified by said commissioners to the President of the United States, then patents should be issued to said company conveying the additional sections of land, as aforesaid, and so on as fast as every twenty-five miles of said road should be so completed.

By section 6 of said act it was further provided that the President of the United States should cause the land to be surveyed for forty miles in width on both sides of the entire line of said road after the general route thereof was fixed and as fast as might be required by the construction of said road, and that the odd-numbered sections of said land thereby granted should not be liable to sale or entry or pre-emption before or after they were surveyed except by said company; that said act of Congress approved July 2, 1864, entitled "An act granting lands to aid in the construction of a railroad and telegraph

line from Lake Superior to Puget's sound, on the Pacific coast, by the northern route" (13 U. S. Stat., 365), shall be considered to be in evidence herein.

2. That within two years after the passage of said act the said railroad company duly accepted the terms, conditions, and impositions thereof in writing, under its corporate seal, executed pursuant to the directions of its board of directors first had and obtained, and on December 29, 1864, served such acceptance on the President of the United States.

3. That thereafter, by a joint resolution approved May 31, 1870, entitled "A resolution of Congress authorizing the Northern
110 Pacific Railroad Company to issue bonds for the construction of its road and to secure the same by mortgages, and for other purposes," it was resolved and provided that in the event of there not being in any State or Territory in which said main line or branch might be located at the time of the final location thereof the amount of lands granted by said act to said company within the limits prescribed by its charter the said company should be entitled, under the directions of the Secretary of the Interior, to receive as many sections of land belonging to the United States and designated by odd numbers in such State or Territory within ten (10) miles on each side of said road beyond the limits prescribed in said charter as would make up the deficiency in said main line or branch (except mineral or other lands as excepted in the charter of said company by said act of Congress approved July 2, 1864) to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of said act of July 2, 1864; that said joint resolution of May 31, 1870, shall be considered to be in evidence herein.

4. That prior to the 30th day of March, 1872, the said railroad company had duly located the general route of its road from the Red River of the North to the Missouri river, in the then Territory of Dakota, now State of North Dakota, and also prior to the said 30th day of March, 1872, the said railroad company transmitted a diagram or map showing the said designated route of said road to the Commissioner of the General Land Office; that said diagram or map was duly filed in the office of the said Commissioner, and on the 30th day of March, 1872, said Commissioner of the General Land Office transmitted a prepared diagram showing the designated route of the said railroad company under act of July 2nd, 1864, to the register and receiver of the United States land office at Pem-
111 bina, Dakota Territory, copy of the letter of transmittal being as follows, to wit:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *March 30th*, 1872.

"Register and receiver, Pembina, Dakota Ter.

"GENTLEMEN: I transmit herewith a diagram showing the designated route of the Northern Pacific railroad under act of July 2, 1864, and by direction of the Secretary of the Interior you are directed to withhold from sale or location, pre emption, or homestead

entry all the surveyed and unsurveyed odd-numbered sections of public lands falling within the limits of forty miles as designated on this map.

"You will also increase in price to $2.50 per acre the even-numbered sections within those limits and dispose of them at that ratability and under the pre-emption and homestead laws only, no private entry of the same being admissable until these lands have been offered at the increased price.

"This order will take effect from the date of its receipt by you, and you are requested to acknowledge without delay the time of its receipt.

"Very respectfully,

"(Signed) W. W. CURTIS,
"*Acting Commissioner.*"

Receipt ack'g'd April 22, 1872.
I 97526.

That on the 22nd day of April, 1872, said map or diagram was duly filed in the United States land office at Pembina, Dakota Territory, and receipt of such letter duly acknowledged by the register and receiver of said land office to the Commissioner of the General Land Office, and the said register and receiver of the Pembina
112 land office made and designated upon the records of the said office the notations in accordance with the said map or diagram; that the tract hereinafter described and involved in this action was coterminous with said line of general route so located prior to March 30th, 1872, as aforesaid.

5. That said railroad company duly proceeded with the work of surveying and definitely locating the line of its said railroad; that prior to May 24, 1873, the said company had definitely located that portion of the line of its road extending from the Red River of the North to the Missouri river, in the Territory of Dakota, now State of North Dakota; that on the 24th day of May, 1873, the said company transmitted a map of that portion of its said line of railroad so definitely located to the Secretary of the Interior, and that on May 26, 1873, the Secretary of the Interior transmitted said map to the Commissioner of the General Land Office with the following letter, to wit:

"DEPARTMENT OF THE INTERIOR,
"WASHINGTON, D. C., 26 *May*, 1873.

"SIR: I transmit herewith for appropriate action map of the definite location of the Dakota division of the Northern Pacific railroad between the Red and Missouri rivers, received on the 24th instant, with letter of same date from W. K. Mendenhall, Esq., att'y for the Co. in this city.

"Very respectfully, your ob't servant,

"C. DELANO, *Secretary.*

"Hon. Willis Drummond, Comm'r G. L. O."

That on the same day, to wit, May 26, 1873, said map was duly filed in the office of the Commissioner of the General Land Office;

that upon the filing of said map or plat the said Commis-
113 sioner made and designated upon the maps and records of his said office the limits of the lands granted by Congress to said railroad company to aid in the construction of the said railroad coterminous with the said line as shown on said plat, namely, forty (40) mile and fifty (50) mile limits on each side of said line of definite location, the first named being the lands in place and hereafter, for the purpose of convenience, being designated the place lands, the second being the limits of the indemnity provided for in the act of Congress approved July 2, 1864, hereafter, for convenience, designated the indemnity lands. Thereafter the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, transmitted to the United States district land officers for the district through which said line of definite location extended and within which such place and indemnity lands fell a diagram showing that portion of the line of said railroad so definitely fixed, as aforesaid, with the place and indemnity limits indicated thereon, and transmitted with said diagram the following letter of instructions, to wit:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE, *June 11th*, 1873.

"Register and receiver, Pembina, D. T.

"GENTLEMEN: The Northern Pacific Railroad Company filed in this office on the 26th ultimo, in accordance with the law, a map of the definite location of their road from the Red River of the North to the Missouri river, in Dakota Ty. I have accordingly prepared a diagram, which is herewith transmitted, showing the forty and fifty mile limits of their land grant along said line, with also the
forty mile limits of withdrawal ordered by my letter to you
114 of March 30th, 1872, upon a designated line and you are hereby directed to withhold from sale or entry all the odd-numbered sections, both surveyed and unsurveyed, falling within those limits, and to hold subject to pre-emption and homestead entry only the even-numbered sections at $2.50 per acre within the forty-mile limits and $1.25 per acre between the forty and fifty mile of indemnity limits.

"The even-numbered sections within the forty-mile limits of former withdrawal now falling without the present corrected limits will be reduced in price to $1.25 per acre.

"The right of the road attached to both surveyed and unsurveyed lands from the date of filing the map of definite location in this office, to wit, May 26, 1873, from which date also the even-numbered sections became double minimum. Be pleased to acknowledge the date of the receipt of this letter.

"Very respectfully, W. W. CURTIS,
"*Acting Commissioner.*"

That said letter and diagram were duly received and filed in the said district land office at Pembina, that being the district within which said lands were situate, June 24, 1873.

The northeast quarter (N. E. ¼) of section thirteen (13), in township one hundred and thirty-two (132) north of range fifty-seven (57) west of the fifth principal meridian, North Dakota, was coterminous with said line of definite location so fixed May 26, 1873, as aforesaid, and was more than forty, but within fifty, miles thereof, being within the indemnity limits, and was, at the date of said grant, at the time said line was definitely fixed and the plat thereof filed in the office of the Commissioner of the General Land Office, and at the time said above letter of the acting Commissioner, dated June 11th, 1873, was written, and at the time it was received at the
115 said United States district land Office at Pembina, and at all times herein mentioned, except as otherwise hereinafter set forth, public land to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from preemption or other claims or rights, and was and is non-mineral in character, and that said alleged order of withdrawal remained in force until revoked under the order of the Secretary of the Interior of August 15, 1887.

6. That said Northern Pacific Railroad Company, prior to 1885, duly definitely located its said line of railroad and filed the maps thereof in the office of the Commissioner of the General Land Office, which said maps were duly approved by the Secretary of the Interior, and thereafter said company duly constructed and completed that portion of its said railroad and telegraph line on, over, and along said line of definite location extending from Lake Superior to Puget sound, as aforesaid (both main and branch line), in all respects as a first-class railroad and telegraph line; that as fast as portions of said railroad and telegraph lines equal to or exceeding twenty-five (25) miles in length were so constructed, as aforesaid, they were examined by commissioners appointed by the President of the United States, and by said commissioners were found and reported to have been constructed in a good, substantial, and workmanlike manner, in all respects as required by said act of Congress; that such reports were duly accepted and approved by the President of the United States, as provided in said act of Congress approved July 2, 1864.

That the portion of said railroad and telegraph line extending on, over, and along said line of definite location from the Red River of the North to the Missouri river was so completed prior to November, 1873; that the President of the United States having appointed three commissioners to examine the same, the said commis-
116 sioners so examined it, and on the 24th day of November, 1873, reported to the Secretary of the Interior that said portion of said railroad and telegraph line had been constructed in a good, substantial, and workmanlike manner, in all respects as required by the act of Congress; that thereafter, to wit, November 28, 1873, the said Secretary of the Interior transmitted said report to the President of the United States with the following recommendation: "The commissioners in their report represent that this portion of the road has been (in the main) constructed in a first-class manner. I would therefore recommend the acceptance of the same

and the issuance to the company of patents for lands due on account of the completion thereof." That said report was accepted and said recommendations approved by the President of the United States December 1, 1873.

7. That on March 19, 1883, the said Northern Pacific Railroad Company filed in said land office at Fargo, Dakota, being the district land office of the United States for the district embracing the lands contained in said list, a certain list of selections under its said grant embracing the said northeast quarter of section 13, township 132 north of range 57 west of the fifth principal meridian, claiming said tract under said act of July 2, 1864, and paid to the receiver of said office the fees required by law; that said tract was within the said Fargo United States land district and was within the indemnity limits of the said grant to the said company. The register and receiver of said land district accepted and filed said list and attached thereto the following certificate:

"UNITED STATES LAND OFFICE,
"FARGO, DAKOTA, *April* 9, 1883.

"We hereby certify that we have carefully and critically
117 examined the foregoing list of lands claimed by the Northern Pacific Railroad Company under the grant to the said company by acts of Congress approved July 2, 1864, and joint resolution approved May 31, 1870, and selected by said Northern Pacific Railroad Company by Charles B. Lamborn, the duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office, and that we find the same to be correct; and we further certify that the filing of said list is allowed and approved, and that the whole of said lands are surveyed public lands of the United States and within the limit of forty miles on each side, and that the same are not, nor is any part thereof, returned and denominated as mineral land or lands not claimed as swamp lands, nor is there any homestead, pre-emption, State, or other valid claim to any portion of said lands on file or record in this office.

"We further certify that the foregoing list shows an assessment of the fees payable to us, allowed by the act of Congress approved July 1, 1864, and contemplated by the circular of instructions dated January 24, 1867, addressed by the Commissioner of the General Land Office to registers and receivers of the United States land officers, and that the said company have paid to the receivers on Mar. 19, 1883, the full sum of five thousand four hundred and eighty-seven & $\frac{20}{100}$ dollars in full payment and discharge of said fees.

"HORACE AUSTIN, *Register.*
"E. C. GEAREY, *Receiver.*"

That on May 28, 1883, the Secretary of the Interior issued the following instructions of the department, to wit:

"The Commissioner of the General Land Office:

"SIR: It is my desire to open for settlement as speedily as possible
118 all the lands within the indemnity limits of the grant to the Northern Pacific Company not actually required to supply the lands lost in place within the granted limits.

"The grant should be adjusted at the earliest possible time that the orders of withdrawal may be vacated without unreasonable delay as indicated in my letter of the 17th instant. The unparelled demand for lands for actual settlement by great numbers of persons, not only from foreign countries, but from the older States seeking homes under the settlement laws along the line and within the vicinity of the Northern Pacific grant, required, for the best interests of the country and for all parties concerned, that the withdrawals should not be maintained any longer than is actually necessary for the adjustment of the guaranteed rights of the company.

"In order to facilitate the work of making selections I think you should instruct the local officers that when clear lists of selections free from conflict or other objections are filed with the district officers and approved by them said selections should at once be marked upon their books and forwarded for final examination, leaving the ascertainment of the lands lost in place to your office instead of requiring preliminary lists of such lost lands, together with the indemnity lands, tract for tract, from the company as heretofore.

"I am satisfied that the work of adjusting the grant will go forward much more rapidly under this plan than under the former practice.

"Very respectfully, H. M. TELLER, *Secretary*."

That the decision of acting Secretary Chandler, of the Interior Department, dated May 1, 1891, entitled Sawyer *vs.* Northern Pacific R. R. Co., as published in vol. 12 of the Decisions of the
119 Department of the Interior Relating to Public Lands, on page 448 and following pages, shall be considered and is hereby introduced as evidence in this case.

That on August 4, 1885, the Commissioner of the General Land Office issued the following circular of instructions, approved by the Secretary of the Interior, to wit:

"Before admitting railroad indemnity selections in any case you will require preliminary lists to be filed, specifying the particular deficiencies for which indemnity is claimed. You will then carefully examine your records, tract by tract, to ascertain whether the loss to the grant actually exists, as alleged. You will admit no indemnity selection without a proper basis therefor. If you are in doubt whether the company is entitled to indemnity for losses claimed, you will transmit the preliminary lists to this office for instructions, and will not place the selections on record until directed so to do.

"Where indemnity selections have heretofore been made without specifications of loss, you will require the companies to designate the deficiencies for which such indemnity is to be applied before further selections are allowed. The selecting agent applying to make indemnity selections must state in his affidavit attached to the list presented that the specific losses for which indemnity is claimed are truly set forth and described in said list, and that said losses have not heretofore been indemnified in any manner.

"Where deficiencies exist for which indemnity is allowed by law,

the lieu selections must be made from vacant, unappropriated land within proper sections and limits nearest the granted sections in which the loss occurred. You will be careful to see that this rule is strictly complied with, and will reject all selections not made in conformity thereto.

"Approved:

"L. Q. C. LAMAR, *Secretary.*"

120 That on October 12, 1887, the Northern Pacific Railroad Company filed in said United States district land office at Fargo a list designating an amount of lands equal to those selected in said list of March 19, 1883, claimed to have been lost and excepted from said grant and within the place limits of said grant, as defined on definite location and as a basis for said selections.

That the decision of acting Secretary Chandler, of the Interior Department, dated June 10th, 1891, in the case of St. Paul, Minneapolis & Manitoba R'y Co. and St. Paul and Northern Pacific R. R. Co., published in vol. 13 of the Decisions of the Department of the Interior Relating to Public Lands, on page 349 and following pages, shall be considered, and is hereby, introduced in evidence in this case.

That thereafter, on February 23, 1892, the said Northern Pacific Railroad Company duly filed in said United States district land office at Fargo a rearranged list in which it designated the lands theretofore selected, as aforesaid, in said list filed March 19, 1883, and therein set opposite each specific description of land so selected the description of a tract of equal area lost from its grant in place, and in lieu of which such indemnity lands had been selected, and therein set opposite the said northeast quarter of section 13, township 132, range 57, and as a basis for the selection of the same the southeast quarter of section 21, township 44 north of range 9 west of the 4th principal meridian, Wisconsin; that said last-described tract was coterminous with and within twenty miles of the portion of said line of said Northern Pacific railroad, as definitely fixed, extending through the State of Wisconsin, and was at the date of the grant to the Northern Pacific Railroad Company and at the time the line of said railroad coterminous therewith was definitely fixed and a plat thereof

121 filed in the office of the Commissioner of the General Land Office, as aforesaid, reserved and appropriated by the United States to aid in the construction of a certain line of railroad under the provisions of the act of Congress approved July 3, 1856, entitled "An act granting public lands to the State of Wisconsin to aid in the construction of railroads in said State," and was at the date of said act of June 3, 1856, and at the time of the definite location of the road, in aid of which said act was passed, public land and free from pre-emption and other claims and rights, and that the railroad provided for by said act of June 3, 1856, was definitely located prior to the definite location of the Northern Pacific railroad in Wisconsin; that at the date of said selection by said company of said northeast quarter of section thirteen, township 132, range 57, there were no filings or entries or applications to make

filing or entry for said tract other than the filing and entry of said plaintiff as herein set forth; that said selection has never been approved by the Secretary of the Interior, except as herein set forth, and neither the Department of the Interior nor the Secretary of the Interior nor any department of the Government has ever made certification that the said company was entitled to the same or to letters patent for the same, but was cancelled by said Secretary in his decision set out in the ninth paragraph hereof; that, except as herein set forth, letters patent or any evidence of title whatsoever for said tract has never been issued or made to said company or to any person or persons whomsoever except to this plaintiff.

8. That under date of May 2, 1896, the Commissioner of the General Land Office made the following certificate, to wit:

"I, S. W. Lamoreux, Commissioner of the General Land Office, do hereby certify that I have caused examination to be made of records of this office relative to the grant to the Northern
122 Pacific Railroad Company, under acts of Congress approved July 2, 1864, and May 31, 1870, and certify that said records show that the total area of lands excepted and lost to said grant within its primary limits amounts to 10,624,746.27 acres, and that there are within the first indemnity limits not to exceed 7,065,523.49 acres, which are, or will be when surveyed, available for the selection to satisfy the losses above referred to, thus leaving a known deficiency of 3,559,222.78 acres in said grant, which cannot be satisfied from the limits as now recognized by this office.

"(Signed) S. W. LAMOREUX,
"*Commissioner.*"

9. That the said southeast quarter of section 21, township 44 north of range 9 west of the 4th principal meridian, Wisconsin, so assigned as a basis for the selection of said northeast quarter of section 13, in township 132 north of range 57 west, lies east of Superior city, in the State of Wisconsin; that on November 14, 1895, the Secretary of the Interior rendered a decision wherein he held that said act of Congress of July 2, 1864, and the acts supplemental thereto and amendatory thereof did not grant to said Northern Pacific Railroad Company any lands east of Superior city, in the State of Wisconsin, and that said company is not entitled under said acts or any of them to take lands east of Superior city; that said Secretary in said decision further ruled as follows:

"I further learn, upon inquiry at your office, that the lands east of Superior city were made the basis of the selection of a large quantity of lands from the indemnity belt of the company's grant in North Dakota. These selections having been made some while ago, many, if not all, of the lands selected have perhaps been sold by the company.

"The previous action of this department giving color to
123 the company's right to a grant east of Superior city and the application of the rule that the indemnity lands should be selected nearest to those lost were the probable causes for the specification of these lands as a basis for the selections referred to.

"In view thereof I have to direct that the company be allowed sixty days from notice of this decision within which to specify a new basis for any of its indemnity selections avoided by this decision, and that during that period no contests against such selections where the charge is that the basis was made lands east of Superior city, or application to enter under the settlement laws will be received."

That within sixty days from the notice of said decision and on November 26, 1895, the said railroad company, in compliance with said order, specified as a basis for its said selection of the said northeast quarter section 13, township 132 — of range 57, the northeast quarter of section 1, in township 3 north of range 33, in the State of Montana, and duly filed said specification on said date in the office of the Commissioner of the General Land Office in accordance with the said direction of the Secretary of the Interior; that said last-described tract was, at the date of said grant to said company and at the date of the definite location of its line of railroad opposite thereto, within the Crow Indian reservation; that said tract was, at the date of said grant and of said definite location, within forty miles of the line of said railroad as definitely located through said State, then Territory, of Montana; that in so assigning said tract as a basis for said selection said railroad company, by its land commissioner, William H. Phipps, filed therewith in the office of said commissioner the following statement, to wit:

"Whereas the honorable Secretary of the Interior did on
124 the fourteenth day of November, 1895, render a decision wherein he held that the Northern Pacific Railroad Company had no grant of lands opposite to and coterminous with its railroad between Superior and Ashland, and that therefore the designation of losses between those points as a basis for the selection of indemnity land elsewhere was invalid; and

"Whereas the Secretary of the Interior in said decision of November fourteenth, 1895, did direct that the said Northern Pacific Railroad Company be allowed sixty days from notice of said decision within which to designate other losses within its said grant in lieu of those within the points theretofore assigned; and

"Whereas the Northern Pacific Railroad Company has heretofore sold a large portion of its indemnity lands, the title to which is affected by the decision of the Secretary of the Interior of November fourteenth, 1895, hereinbefore referred to:

"Now, therefore, the said Northern Pacific Railroad Company, because of said decision of the Secretary of the Interior and to facilitate the adjustment of the title to said indemnity lands so affected by said decision, reserving and saving all rights of the company heretofore acquired and expressly maintaining and insisting that all provisions of the act of July 2, 1864, for its benefit are in all respects in full force and operation as far east as Ashland, the Northern Pacific Railroad Company, for the sole purpose of protecting and saving the titles of its purchasers to indemnity lands affected by the decision of the Secretary of the Interior of Novem-

ber fourteenth, 1895, hereby submits, pursuant to the directions of said decision, a list of losses to be substituted for those heretofore embraced in Fargo list No. 6 as originally filed on March 19, 1883, and rearranged February 23rd, 1892.

"And the said company prays the approval of said amended
125 list and the prompt issuance of patent therefor.

"WM. H. PHIPPS,

"*Land Commissioner N. P. R. R. Co.*"

That said tract so assigned as a basis for the selection of said northeast quarter of section 13, in township 132 north of range 57, was excepted from said grant to said company by reason of being included in said Indian reservation, and said company was entitled to select indemnity therefor.

That on or about the 10th day of April, 1882, plaintiff, being qualified to hold and acquire land under the pre-emption laws of the United States, settled upon and improved the said northeast quarter of section thirteen, in township one hundred and thirty-two north of range fifty-seven west of the fifth principal meridian, in the county of Sargent, State of North Dakota, then the Territory of Dakota, with the intention of entering the same under the provisions of the act of Congress approved September 4, 1841, and the acts supplemental thereto and amendatory thereof, authorizing the entry and purchase of public lands of the United States by the citizens thereof and those who have declared their intention to become such citizens, and that on the 2nd day of November, 1882, he duly presented to the United States land office at Fargo, Dakota Territory (now State of North Dakota), a declaratory statement, No. 11747, for said tract, as provided by law, which was duly received, filed, and placed upon the records of the said land office.

10. That plaintiff resided upon and cultivated said land, as required by law, from the said 10th day of April, 1882, to the 4th day of April, 1883, at which latter date he submitted final proof therefor, as provided by law, and then and there duly tendered the Government price for said tract, together with all the required fees, to the said land office, and that said final proof was then and there
126 rejected by the register and receiver of the United States district land office, assigning as a reason therefor that the described land had been withdrawn from entry under the said act of July 2, 1864, and the acts of Congress supplemental thereto and amendatory thereof; that plaintiff duly appealed from the said decision of the district land office to the Commissioner of the General Land Office, who on the 5th day of October, 1883, affirmed the decision of the district land office; that the plaintiff had no notice whatsoever of the said decision of October, 1883, until on or about the 1st day of August, 1888, at which date he made application for a review thereof by the Commissioner of the General Land Office, and thereupon that officer, on the 25th day of September, 1888, rendered the following decision, to wit:

"DEPARTMENT OF THE INTERIOR,
"GENERAL LAND OFFICE,
"WASHINGTON, D. C., *Sept.* 25, 1888.

"Register and receiver, Fargo, Dakota.

"GENTLEMEN: I have considered the application of Fred Hewitt for a review of office decision of October 5, 1883, affirming your action in rejecting his final proof for N. E. ¼ section 15, town 132 N., range 57 W.

"Said tract is within the fifty-mile indemnity limit of the withdrawal for the benefit of the Northern Pacific R. R. Co. ordered by letter from this office dated June 11, 1873, received at the local office, then at Pembina, June 24, 1873. The township was surveyed July 12 to 27, 1882, and the plat of survey was filed in your office on the 13th day of October following. The whole of said section was selected by the agent of the railroad company March 19, 1883, per list No. 6.

"The records here show that Hewitt presented his final pre-
emption proof at your office, which was rejected for conflict
127 with the withdrawal and selection above recited, and from this action Hewitt appealed.

"Your decision was confirmed by this office as being in accordance with the instructions contained in the circular approved May 26, 1883

"Hewitt asks for a review of the above decision on the ground that he never received any notice thereof until recently informed by an attorney at Washington.

"The final proof submitted by applicant shows that he is a native-born citizen, over 21 years of age, and a qualified pre-emptor July 10th, 1882; his improvements consisted of a frame house 16 x 16 feet, stable 10 x 12 feet, and 20 acres of ground broken, the value of the same being estimated at $350. This declaratory statement was presented for filing within the time prescribed by law and was accepted by your office, a receipt issuing therefor.

"Under the late decision of the Hon. Secretary of the Interior, in the case of The Northern Pacific R. R. Co. *vs.* Guilford Miller, it is held that the withdrawal of indemnity lands for the benefit of said company was prohibited by the 6th section of the granting act and, being in violation of the law, was without effect, was not operative to defeat the rights of *bona fide* adverse claimants under the general laws of the United States, who settled on lands within such limits prior to the time when selection by the railroad had been made.

"In view of the fact that claimant established his actual residence and had permanent improvements upon the land prior to the Government survey or selection by the railroad company, his claim was superior thereto, and hence office decision of October 5, 1883, is set aside, Hewitt's final proof admitted, and the selection by the railroad company held for cancellation.

"Advise all parties in interest promptly of this decision and
128 that 60 days will be allowed for appeal.

"The resident attorneys for the railroad company will be notified by letter from this office.

"Very respectfully, S. M. STOCKSLAGER,
"*Commissioner.*"

That the said case of Northern Pacific Railroad Company *vs.* Guilford Miller and the report thereof shall be considered to be evidence herein and may be considered by the court.

That thereafter the said Northern Pacific Railroad Company duly appealed from said decision of the Commissioner of the General Land Office to the Secretary of the Interior, and said Secretary of the Interior on August 11, 1894, made and rendered his certain decision in the words and figures following, to wit:

"DEPARTMENT OF THE INTERIOR,
"WASHINGTON, *Aug.* 11, 1894.

"NORTHERN PACIFIC R. R. Co.
vs.
FRED HEWITT.

"The Commissioner of the General Land Office.

"SIR: I have considered the appeal of the Northern Pacific R. R. Co. from your office decision of September 25, 1888, holding for cancellation its indemnity selection of the N. E. ¼ sec. 13, T. 132 N., R. 57 west, Fargo, North Dakota, on account of the prior claim of Fred Hewitt under his pre-emption filing, upon which he has submitted proof.

"Your office decision is based upon the holding that prior to selection lands within said limits are subject to appropriation as other public lands, which is in harmony with the recent decision of this department in the case of Jennie L. Davis *vs.* Northern Pacific R. R. Co. (19 L. D., —), and your office decision is therefore affirmed
129 and the company's selection will be canceled. Herewith I return the papers.

"Very respectfully, HOKE SMITH, *Secretary.*"

That the said case of Northern Pacific R. R. Co. *vs.* Davis (Davis vs. N. P. R. R. Co.) and the report thereof shall be considered to be in evidence herein and may be considered by the court.

That on June 22, 1895, pursuant to said decision of the Secretary of August 11, 1894, and based upon said pre-emption final proof so made, as aforesaid, by said plaintiff, letters patent of the United States were duly issued under the great seal of the United States, purporting to convey to said plaintiff the said northeast quarter of section 13, township 132 of range 57, North Dakota.

11. That from the said 10th day of April, 1882, to the 21st day of June, 1884, plaintiff resided upon and was in the actual possession of said tract and every portion thereof and had valuable improvements thereon.

12. That on June 21, 1884, and while plaintiff was so in possession of said land the said defendant, Emil Schultz, made and entered

into a certain contract in writing with the said railroad company, by the terms whereof said railroad company agreed, in consideration of twelve hundred dollars ($1,200), to sell and convey the said northeast quarter of section 13, township 132, range 57, to the said defendant, Emil Schultz, and the said Emil Schultz then and therein agreed to purchase the said land from the said company and to pay to said company the said sum therefor; that upon the making of said contract the said Emil Schultz entered upon said tract and ousted said plaintiff from the actual possession thereof and took up his residence thereon, and has since continued
130 to reside thereon and cultivate and improve the same; that the said defendant, Schultz, having paid to the said railroad company the consideration agreed by him to be paid to said company for said land in said contract of sale, as aforesaid, the said company, on or about December 18, 1889, made, executed, and delivered its certain indenture of deed, with full covenant of warranty, whereby it conveyed to the said defendant, Schultz, the said northeast quarter of section 13, in township 132 north of range 57 west.

13. The plaintiff has not at any time made a conveyance or attempted conveyance of said premises, but now holds any and all title thereto which he may have received from the United States, as hereinafter set forth.

The said defendant, Schultz, has not at any time made a conveyance or attempted conveyance of the said premises, but now holds any and all title thereto which he may have received from the said Northern Pacific Railroad Company by virtue of the said contract and deed.

14. That the value of the rents, issues, and profits of said tract during the time of its occupancy by said Schultz, as aforesaid, is the sum of seven hundred and fifty (750) dollars.

15. That the value of the improvements made upon said tract by said defendant, Schultz, is the sum of six hundred (600) dollars, and the value of the land without the improvements is the sum of eight hundred (800) dollars.

16. That the said defendant Frederika Schultz is the wife of the said defendant Emil Schultz.

17. That none of the buildings or improvements made or placed upon the tract involved in this action, to wit, the northeast quarter (N. E. ¼) of section thirteen (13), township one hundred thirty-two (132) north of range fifty-seven (57) west, by the defendants or either of them were made or placed thereupon while the
131 defendants or either of them were holding under color of title adversely to the claim of plaintiff in good faith.

18. That if the plaintiff in this action shall prevail the defendants and each of them hereby waive all claim or right of recovery against plaintiff by counter-claim or otherwise for the value of said buildings and improvements or either or any of them, and consent and agree that proper findings in accordance with this stipulation may be made and judgment and decree based thereon may be entered accordingly in this action.

19. That the tract of land involved in the action entitled Grandin *vs.* La Bar, as reported in 57 N. W. Rep., 241, and the pages following, was selected by the said Northern Pacific Railroad Company at the same time and included in the same list of selections as the tract involved in this action, and the foregoing certificate, dated April 9th, 1883, on pages 8 and 9, is appended to the said list of selections, included in which list is the tract involved in the case of Grandin *vs.* La Bar aforesaid.

20. That either party to this action may submit other or further evidence in this action.

THOMAS A. CURTIS,
PIERCE & AUSTIN,
Attorneys for Plaintiff.
BALL, WATSON & MACLAY,
JAMES B. KERR,
J. B. McNAMEE,
Attorneys for Defendants.

And thereupon the said case was presented and argued before the said court and duly taken under advisement, and thereafter, as appears by the record herein, the court made and filed its findings of fact and conclusions of law, and thereupon the said defend-
132 ants, by their attorneys, duly appeared and submitted exceptions to said findings of fact and conclusions of law, which were and are hereby allowed, the said exceptions so filed and allowed being in the words and figures following, to wit:

FRED HEWITT, Plaintiff,
vs.
EMIL SCHULTZ and FREDERIKA SCHULTZ, Defendants.

Now comes the defendants, by their attorneys, Ball, Watson & Maclay, James B. Kerr, and J. B. McNamee, and except to all the findings of fact and conclusions of law herein for the reason and upon the ground that said findings of fact and conclusions of law were prepared by the attorney for the plaintiff and signed by the court without notice to the attorneys for said defendants and without a submission to said defendants of a copy thereof or a copy of the proposed findings of fact prior to the signing thereof.

Defendants further except to the first conclusion of law on the ground that the same is not sustained by the evidence or the findings of fact therein.

Defendants except to the second conclusion of law on the ground that the same is not sustained by the evidence and the findings of fact therein.

Defendants in like manner except to the third conclusion of law upon the ground and for the reason that the same is not sustained by the evidence or the findings therein, and is contrary to the findings and contrary to the evidence.

Defendants in like manner except to the fourth conclusion of law upon the ground that the same is not sustained by the evidence or

findings herein, and that the same is contrary to law and
133 contrary to the evidence and contrary to the findings herein.

Defendants in like manner except to the fifth conclusion of law upon the ground that the same is not sustained by the evidence or findings herein, and that the same is contrary to law contrary to the evidence, and contrary to the findings herein.

Defendants in like manner except to the sixth conclusion of law upon the ground that the same is not sustained by the evidence or findings herein, and that the same is contrary to law, contrary to the evidence, and contrary to the findings herein.

Defendants in like manner except to the seventh conclusion of law, upon the ground that the same is not sustained by the evidence or findings herein, and that the same is contrary to law, contrary to the evidence, and contrary to the findings herein.

And thereafter the defendants, by their attorneys, duly presented and filed certain specifications of error in the words and figures following, to wit:

"FRED HEWITT, Plaintiff,
vs.
"EMIL SCHULTZ and FREDERIKA SCHULTZ, Defendants.

"*Specification of Errors.*

"Defendants specify the following errors herein:

1. "The court erred in holding and deciding that the plaintiff was the owner in fee-simple of the land in controversy, to wit, the northeast quarter of section 13, township 132 north of range 57 west of the fifth principal meridian, North Dakota.

2. "The court erred in holding and deciding that the
134 defendants had no estate, interest, right, or title in or to said premises.

3. "The court erred in holding and deciding that the order of withdrawal made by the acting Commissioner of the General Land Office on June 11, 1873, was made in violation of law and was without effect and void in so far as it relates to the land in controversy.

4. "The court erred in holding and deciding that the Northern Pacific Railroad Company never made a valid selection of the land in controversy for indemnity purposes.

5. "The court erred in holding and deciding that the defendants wrongfully and unlawfully withheld the possession of said premises from the plaintiff, and that the plaintiff is entitled to the possession of the said premises.

6. "The court erred in holding and deciding that the plaintiff is entitled to judgment against the defendants for the sum of seven hundred and fifty (750) dollars, or any sum, for the rents, issues, and profits of said premises.

7. "The court erred in failing and refusing to hold and decide that the defendants are the equitable owners of said premises and the whole thereof.

8. "The court erred in failing and refusing to hold and decide that

the Northern Pacific Railroad Company made a valid selection of said premises as indemnity under the act of Congress of July 2, 1864.

9. "The court erred in failing and refusing to hold and decide that the land in question was withdrawn from pre-emption and homestead entry by virtue of section six of the act of Congress approved July 2, 1864, from and after the filing of the map of general route coterminous with said premises on the 30th day of March, 1872.

10. "The court erred in failing and refusing to hold and
135 decide that the said premises were withdrawn from pre-emption and homestead entry by virtue of the order of the Commissioner of the General Land Office dated June 11, 1873, from and after June 24, 1873, when said order was received at said district and office, at Pembina, Dakota Territory.

11. "The court erred in failing and refusing to hold and decide that the patent of the plaintiff is null and void.

12. "The court erred in ordering judgment against the defendants for costs.

"BALL, WATSON & MACLAY,
"JAMES B. KERR,
"J. B. McNAMEE,
"*Attorneys for Defendants.*"

STATE OF NORTH DAKOTA, }
County of Sargent. }

District Court.

FRED HEWITT, Plaintiff, }
vs.
EMIL SCHULTZ and FREDERIKA SCHULTZ, Defendants. }

I, W. S. Lauder, judge of the district court in and for the fourth judicial district, before whom the above-entitled case was tried, do hereby certify that the foregoing is a complete statement of said case; that it contains all the evidence submitted at the trial thereof and all the exceptions taken by said parties and allowed; that the said statement is correct, and to the end that it may be made of record in the case it is hereby settled.

By the court:

W. S. LAUDER, *Judge.*

Feb'y 8th, 1898.

136 STATE OF NORTH DAKOTA, }
County of Sargent. }

In District Court, Fourth Judicial District.

FRED HEWITT, Plaintiff,
vs.
EMIL SCHULTZ and FREDERIKA SCHULTZ, Defendants.

Notice of Appeal.

To T. A. Curtis, Esq., and Messrs. Pierce & Austin, attorneys for the above-named plaintiff:

Please take notice that the defendants above named appeal to the supreme court of the State of North Dakota from the judgment heretofore rendered in this action and from the whole thereof.

Dated February 17th, 1898.

BALL, WATSON & MACLAY,
JAMES B. KERR,
J. B. McNAMEE,
Attorneys for Defendants.

STATE OF NORTH DAKOTA, }
County of Sargent. }

In District Court, Fourth Judicial District.

FRED HEWITT, Plaintiff,
vs.
EMIL SCHULTZ and FREDERIKA SCHULTZ, Defendants.

Whereas, on the 31st day of January, 1898, in the district court within and for the county of Sargent, State of North Dakota,
137 the above-named plaintiff obtained judgment against the above-named defendants; and

Whereas the above-named defendants, feeling aggrieved thereby, intend to appeal from said judgment to the supreme court of the State of North Dakota:

Now, therefore, we do hereby undertake that the said defendants and appellants will pay all costs and damages which may be awarded against them on said appeal not exceeding the sum of $250.

Dated February 17th, 1898.

EMIL SCHULTZ AND
FREDERIKA SCHULTZ,
By BALL, WATSON & MACLAY,
Their Attorneys.

ALEX. STERN.
MAURICE KAUFMANN.

STATE OF NORTH DAKOTA, } ss:
County of Cass, }

On this 17th day of February, 1898, before me, a notary public within and for said county and State, personally appeared Alex. Stern and Maurice Kaufman, known to me to be the same persons who are described in and who executed the foregoing instrument, and acknowledged to me that they executed the same; and each of them, duly sworn, says each for himself that he is one of the sureties above named, and that he is worth the sum of $250, specified in the foregoing undertaking, in property situated in the
138 State of North Dakota over and above his debts and liabilities and exclusive of his property exempt from execution.

ALEX. STERN.
MAURICE KAUFMAN.

Subscribed and sworn to before me this 17th day of February, 1898.

D. G. MACLAY,
[SEAL.] *Notary Public, Cass County, North Dakota.*

139 STATE OF NORTH DAKOTA, }
County of Sargent. }

District Court.

FRED HEWITT, Plaintiff, }
vs.
EMIL SCHULTZ and FREDERIKA SCHULTS, Defendants. }

Specification of Errors.

Defendants specify the following errors herein:

1.

The said court erred in holding and deciding that the plaintiff was the owner in fee of the land in controversy, to wit, the northeast quarter of section 13, township 132 north of range 57 west of the fifth principal meridian, North Dakota.

2.

The court erred in holding and deciding that the defendants had no estate, interest, right, or title in or to said premises.

3.

The court erred in holding and deciding that the order of withdrawal made by the acting Commissioner of the General Land Office on June 11, 1873, was made in violation of law and was without effect and void in so far as it relates to the land in controversy.

4.

The court erred in holding and deciding that the Northern Pacific

Railroad Company never made a valid selection of the land in controversy for indemnity purposes.

5.

The court erred in holding and deciding that the defendants wrongfully and unlawfully withhold the possession of said premises from the plaintiff, and that the plaintiff is entitled to the
140 possession of the said premises.

6.

The court erred in holding and deciding that the plaintiff is entitled to judgment against the defendants for the sum of seven hundred and fifty (750) dollars, or any sum, for the rents, issues, and profits of said premises.

7.

The court erred in failing and refusing to hold and decide that the defendants are the equitable owners of said premises and the whole thereof.

8.

The court erred in failing and refusing to hold and decide that the Northern Pacific Railroad Company made a valid selection of said premises as indemnity under the act of Congress of July 2, 1864.

9.

The court erred in failing and refusing to hold and decide that the land in question was withdrawn from pre-emption and homestead entry by virtue of section six of the act of Congress approved July 2, 1864, from and after the filing of the map of general route coterminous with said premises on the 30th day of March, 1872.

10.

The court erred in failing and refusing to hold and decide that the said premises were withdrawn from pre-emption and homestead entry by virtue of the order of the Commissioner of the General Land Office, dated June 11, 1873, from and after June 24, 1873, when said order was received at said district land office at Pembina, Dakota Territory.

11.

The court erred in failing and refusing to hold and decide that the patent of the plaintiff is null and void.

141 12.

The court erred in ordering judgment against the defendants for costs.

BALL, WATSON & MACLAY,
JAMES B. KERR, AND
J. B. McNAMEE,
Attorneys for Defendants.

142 On the 13th day of May, 1898, the said appeal was duly argued before the said supreme court of the State of North Dakota, as more fully appears from the minutes of said court; which minute record is in words and figures as following, to wit:

Supreme Court of the State of North Dakota.

Term Minutes, April Term, A. D. 1898.

FRIDAY, *May 13th*, 1898.

Pursuant to adjournment, court convened at 10 a. m., all the judges and officers of the court being present.

Now the court called for argument.

File No. 562.

FRED HEWITT, Respondent,
vs.
EMIL SCHULTZ ET AL., Appellants.

Appearances: For the appellants, Ball, Watson & Maclay and James B. Kerr; *contra*, Pierce & Austin.

Case argued, submitted to the court, and taken under advisement.

143 On the 27th day of May, A. D. 1898, the judgment of the said supreme court of the State of North Dakota was duly entered; which judgment is in words and figures following, to wit:

STATE OF NORTH DAKOTA, *ss*:

In the Supreme Court.

File No. 562.

FRED HEWITT, Plaintiff and Respondent,
vs.
EMIL SCHULTZ and FRIEDERIKA SCHULTZ, Defendants and Appellants.

Appeal from the district court of Sargent county.

This action coming on to be heard at the April, 1898, term of this court, at the supreme court room, in the city of Bismarck, State of North Dakota—present, Guy C. H. Corliss, chief justice; J. M. Bartholomew and Alfred Wallin, associate justices—and the appeal herein having been argued by Ball, Watson & Maclay and James B. Kerr for the appellants, and by Pierce & Austin for respondent, and the court having advised thereon, it is now here considered, ordered, and adjudged that the judgment of the said district court within and for said Sargent county, appealed from herein, be, and the same is hereby, reversed and the district court is directed to dismiss the action.

And it is further ordered that this cause be, and it is hereby,

remanded to the district court for further proceedings according to law and the judgment of this court.

And it is further considered and adjudged that appellants have and recover of the respondent costs and disbursements on this appeal expended, to be taxed and allowed in the district court.

144 Dated May 27, 1898.

By the court:

GUY C. H. CORLISS,
Chief Justice.

Attest:

[SEAL.] R. D. HOSKINS, *Clerk.*

145 On the said 27th day of May, 1898, the written opinion of the said the supreme court of the State of North Dakota was filed; which opinion is in the following words and figures, to wit:

In the Supreme Court, State of North Dakota, April Term, 1898.

FRED HEWITT, Respondent,
vs.
EMIL SCHULTZ and FRIEDERIKA SCHULTZ, Appellants.

Congress did not take from the Land Department the power of withdrawal with respect to lands within the indemnity limits of the grant to the Northern Pacific Railroad Company.

Accordingly, held that a patent based upon an entry of land within such limits after the withdrawal thereof by the acting Commissioner of the General Land Office was void.

(Syllabus by the court.)

Appeal from the district court of Sargent county, W. S. Lauder, judge.

Ball, Watson & Maclay, James B. Kerr, and J. B. McNamee, for appellants; Pierce & Austin and T. A. Curtis, for respondent.

CORLISS, *C. J.*:

The plaintiff has brought ejectment to recover from the grantees of the Northern Pacific Railroad Co. the possession of a quarter section of land situated within the indemnity belt of the land grant of that corporation. His pre-emption settlement upon the land

146 was made after the same had been withdrawn from entry by the acting Commissioner of the General Land Office. Following certain rulings of the Land Department that the withdrawal was void, the Secretary of the Interior, affirming the decision of the Commissioner, held that, despite such withdrawal, the plaintiff's final proof should be received, and thereafter a patent was issued to him. The defendants attack the validity of this patent, claiming that it is absolutely void, because the entry was made upon lands which were, on account of the withdrawal, no longer open to entry. They predicate this contention upon the proposition that the withdrawal referred to was legal and operated to place the land in ques-

tion beyond the reach of private settlement. That the patent is void if the position taken by defendants be sound would not seem to admit of doubt; nor is the point seriously contested by counsel for plaintiff. If the withdrawal was valid, then the land was land included within a reservation by the proclamation of the President, was distinctly held in Wolsey *vs.* Chapman, 101 U. S., 755. Where the land entered is not subject to entry the patent is void. Burfenning *vs.* Railroad Company, 163 U. S., 321. We are therefore brought face to face with the question, the crucial question in the case, whether, in view of the peculiar provisions of the land grant to the Northern Pacific Railroad Co., the executive branch of the Government had any authority to withdraw from entry any of the lands within the indemnity belt of such grant. It is essential to an intelligent discussion of this question that we should quote two sections of this granting act—sections three and six. Section three declares: "That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast,

* * * every alternate section of public land not mineral,

147 designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of the said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands shall be selected by the company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections."

Section six provides: "That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale or entry, or pre emption before or after they are surveyed, except by said company as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May 20, eighteen hundred and sixty-two, shall be, and the same are hereby extended to all other lands on the line of said road, when surveyed, excepting

148 those hereby granted to said company. And the reserved alternate sections shall not be sold by the Government at a

less price than two dollars and fifty cents per acre when offered for sale."

In construing these enactments we must keep steadily in mind the fact that Congress well knew that the power of withdrawal was vested in the executive branch of the Government. See Wadeing *vs.* Des Moines Co., 5 Wall., 687; Wolsey *vs.* Chapman, 101 U. S., 755; Riley *vs.* Wells, 154 U. S., 578; Spencer *vs.* McDougal, 159 U. S., 62; Northern Pacific Railroad Co. *vs.* Missoula Country Co., 18 Sup. Ct. Rep., 206. Secretary Vilas, in his opinion in the Miller case, 7 L. D., 100, holds that section six, both by implication and by express provision, takes from the executive branch of the Government the well-recognized and frequently exercised power of withdrawal with respect to land within the indemnity limits of the grant contained in the statute. We fail to discover any force in his reasoning upon either point. So far from the first portion of the section creating an implication that no power of withdrawal should ever be exercised by the officers of the Land Department or by the President, we think that the implication is exactly the reverse. Why did Congress embody in that section the provision that after the general route should be fixed the odd sections should not be liable to entry, etc.? The reason is perfectly obvious when we turn back to section three and examine its provisions in connection with those of section six. Two distinct acts were to be performed by the corporation in securing title under this grant. It must first fix its general route. Subsequently it must file its map of definite location. Between these two periods, which might be separated by years of time, settlers would naturally be attracted to the land along such general route, and the company might find by the time its map of definite location was filed that so numerous were the
149 settlements upon the lands embraced within the grant that the value of the grant had been seriously impaired. Under section three the company must take the land subject to all entries upon the odd sections made prior to the filing of the map of definite location, and therefore subject to all entries intermediate the fixing of the general route and the filing of such map. Congress plainly saw that unless settlement during this period was prevented an extraordinary influx of population might so reduce the acreage of the grant that the indemnity land would not suffice as a means of adequate indemnity. There was power, it was true, in the officers of the Land Department to withdraw for settlement this land within the place limits after the general route had been fixed; but the hazard to the company was deemed too great to leave in a state of uncertainty—to entrust to the discretion of a public official—that which could be easily settled in the law itself, and accordingly, to preclude all possibility of a great tide of immigration engulfing and sweeping away much of the grant which it was intended the company should enjoy, Congress itself erected the dyke which was to keep out this anticipated flood. It is strange, indeed, that such a precaution should ever have been thought by a rational mind to indicate by implication a legislative purpose to take from the Land

Department the conceded power of that department to extend to the company within the indemnity limits a similar protection in case of need. The feature of this grant to the Northern Pacific Railroad Co. which stands out in bold relief is the purpose of the Federal Government to give to the company as an equivalent for the tremendous financial hazard of constructing a great railway system through a vast stretch of unsettled territory and over almost impassible mountains a grant of land which in any event should equal in area the amount it would receive were every odd
150 section specified in the grant free from claim at the time its map of definite location should be filed. Congress intended that the grant should be in substance a grant in quantity, and, to the end that it might keep its word of promise to the hope as well as to the ear, it carefully guarded against the material diminution of the acreage of the grant by settlements intervening between the time when the company should file its map of general route and the time when it should file its map of definite location. We would little expect from such legislation to find the same body in one and the same breath taking from the Land Department the old and often-exercised power of withdrawal, when to do so would subject the grantee to the hazard of losing a portion of its grant—the very hazard from which such body had so carefully guarded the grantee in the preceding sentence. Why in this particular case such power should be withheld it is impossible to discover. If Congress intended in good faith to see to it that the full grant should ultimately accrue to the company, it is incredible that it should without any explicable reason therefor take from the Land Department a power so necessary to the accomplishment of that purpose as the power of withdrawal. Even if the statute were not clear in meaning, it would be disgracefully derogatory to the honor of the United States to assume that in a covert way Congress intended to impair the value of the grant by enacting in the disguise of ambiguous language that the Land Department should not be permitted to defend the grant by the exercise of the well-known power of withdrawal. It is not difficult to ascertain why the last clause of section six was passed. In 1862, two years before the grant to the Northern Pacific Railroad Company, Congress had extended the pre-emption rights to unsurveyed lands. 12 Stat., 413. It readily saw that the moment the general route was fixed a strong current of
151 population might and probably would flow in the direction of the adjoining lands within the place and the indemnity limits, practically all of which lands were unsurveyed. Under the act of 1862 these settlements would be good, although upon unsurveyed lands, provided they were not made upon odd sections within the place limits. In the indemnity belt they would all be good without reference to the number of the section; thus it might happen that long before the lands could be surveyed, and therefore long before the time could arrive when the company would know what losses it had sustained by reason of prior settlements and in other ways, and therefore be in position to make selections, this fund of real estate, out of which these losses were to be made good,

would be wrested from the company by prior pre-emption entries. Congress plainly saw that it would be unjust to the company to leave the general provision of the act of 1862, that a pre-emptor could initiate his rights on unsurveyed land, in force as to the indemnity lands, and hence it declared in terms that those provisions should apply only after the land had been surveyed; therefore under ordinary circumstances the company could protect itself, as it would, as a rule, make its selections before private settlements could be made; but in the event that a withdrawal should at any time become necessary the power of withdrawal was, we are clear, to be exercised as in other cases. For other reasons, equally forcible to the mind of the statesman, Congress placed all lands (except the odd sections in the place limits, which were withdrawn absolutely, whether surveyed or not) in the same category. The odd sections in the indemnity limits were not to be open to settlement until surveyed, that the company might be protected, and the other sections in both limits were not to be open to settlement, that the settlers themselves might be protected. It would certainly
152 be an unwise policy to tempt people upon unsurveyed lands with the inevitable risk of finding in many cases after survey that the- had settled upon property belonging to the railroad company—*i. e.*, odd sections within the place limits—and which, therefore, they could not hold. When we bring to the interpretation of this law a spirit large enough for the task and do not spend our ingenuity in an endeavor to force into it some hidden meaning we find no difficulty in discovering that Congress never dreampt of taking away the power of withdrawal. We read in every line of the statute an unmistakeable purpose to surround the interests of the company with every possible safeguard against the impairment of the grant on the faith of which it was known that large investments of capital would be risked. Had Congress in terms declared that the power of withdrawal should never be exercised as to the indemnity lands, the grant would probably never have been accepted. We do not believe that the capitalists who embarked their money in this enterprise ever believed that this power whose exercise might become essential to the protection of the integrity of the grant had been taken away. Where is the language to create such a belief? It is not to be found. Had so radical a change in national policy with respect to public lands been determined upon this particular case the phraseology of the act on this point would have been explicit. Secretary Vilas has by ignoring the general spirit of the act and other legislation, which throws light upon its interpretation, forced into the law a meaning neither expressed nor implied, one which presupposes that Congress intended without any reason for so doing to depart from an established practice when there was every reason why it should adhere thereto. Going back in imagination to the time when this law was framed and taking up our position alongside of the members of the committee whose duty it was to draft it and bringing to bear upon the question the large
153 views of true statesmanship, looking to every consideration which should be weighed, it seems to us, in the light of the

language of the statute, that the train of reasoning which passed through the minds of that committee lies upon the very surface. "We desire that the company shall lose none of its grant; therefore we will not allow it to be subject to losses in the place limits after the general route is fixed, and therefore we will not permit settlement within the indemnity belt until the lands are surveyed, when the company can for the first time have an opportunity to make selections for losses, and therefore, in conclusion, we will not take away the power of withdrawal as to the indemnity lands; which power may be found indispensible to the full protection of the grant in all its integrity."

Contemporaneous construction of this law by the officers of the Land Department is in harmony with our views. Down to the time of the decision made by Secretary Vilas the whole trend of opinion was in the opposite direction. More than forty withdrawals of indemnity land had at that time been made. The construction of the law by those who are charged with the duty of executing it has often been deemed very persuasive. U. S. *vs.* Moore, 95 U. S., 763; U. S. *vs.* Pugh, 99 U. S., 289; U. S. *vs.* McDaniel, 7 Pet., 1; Railroad Company *vs.* Barnes, 2 N. D., 383; U. S. *vs.* Johnson, 124 U. S., 236; U. S. *vs.* Philbrick, 120 U. S., 52. The spirit of the law, the letter of the law, long continued contemporaneous construction of the law by the officers of the Land Department, the failure of Congress to check by a specific enactment this constant practice of making such withdrawals, and finally the manifest reason and justice of the case, coupled with the impossibility of discovering any ground for taking the land in the indemnity belt of this grant out of the universal rule—these all combine to make a conclusive case against the decision of Secretary Vilas that the power of
154 withdrawal was taken away. Our conclusion, therefore, is that the withdrawal was legal, and that therefore the plaintiff's patent is void. It follows that he cannot maintain this action, as he must recover on the strength of his own title. The judgment of the district court is reversed, and that court is directed to dismiss the action.

All concur.

GUY C. H. CORLISS.
J. M. BARTHOLOMEW.
ALFRED WALLIN.

155 On the 23rd of January, 1899, there was filed in said court a petition for a writ of error; which petition is in words and figures as follows, to wit:

STATE OF NORTH DAKOTA:

In the Supreme Court.

FRED HEWITT, Plaintiff in Error,
vs.
EMIL SCHULTZ and FRIEDERIKA SCHULTZ, Defendants in Error.

Now comes the above-named Fred Hewitt, plaintiff in error, and prays that the writ of error in the above-entitled cause may issue to the said supreme court for the State of North Dakota to review a certain judgment entered in said court on the 27th day of May, 1898, in favor of the said Emil Schultz and Friederika Schultz, defendants in error, and against the said Fred Hewitt, plaintiff in error, and dismissing the complaint and action of the said Fred Hewitt, plaintiff in error, for the reason that manifest error hath intervened in the rendition of said judgment of said supreme court of North Dakota, to the great damage of said plaintiff in error; all of which will more in detail appear from the assignment of errors which is filed with this petition.

FRED HEWITT,
Plaintiff in Error,
By JAMES A. KELLOGG,
His Attorney.

Dated December 17th, 1898.

156 On the 23rd of January, 1899, there was filed in said court assignments of error; which assignments of error are in words and figures as follows, to wit:

STATE OF NORTH DAKOTA:

In the Supreme Court.

FRED HEWITT, Plaintiff in Error,
vs.
EMIL SCHULTZ and FRIEDERIKA SCHULTZ, Defendants in Error.

Assignments of Error.

Comes the said Fred Hewitt, plaintiff in error, appellant, by James A. Kellogg, his attorney, and says that in the record and proceedings in the above-entitled matter there is manifest error in this, to wit:

I.

The said court erred in holding and deciding that Congress did not take from the Land Department the power of withdrawal with respect to lands within the indemnity limits of the grant to the Northern Pacific Railroad Company.

II.

The court erred in holding and deciding that the land in controversy was withdrawn from the pre-emption and homestead entry by

virtue of the withdrawal order of the acting Commissioner of the General Land Office, dated June 11th, 1873.

III.

The court erred in refusing to hold and decide that the said alleged withdrawal of the said indemnity lands by the acting Commissioner of the General Land Office was prohibited by the act of Congress of July 2nd, 1864, and without authority of law and void.

IV.

That the court erred in refusing to hold and decide that
157 the order of withdrawal made by the acting Commissioner of the General Land Office on June 11th, 1873, was made in violation of law, and was without effect and void in so far as it relates to the premises in controversy.

V.

The court erred in holding and deciding that said premises were not subject to entry under the pre-emption and homestead laws of the United States.

VI.

The court erred in holding and deciding that the Northern Pacific Railroad Company made a valid selection of the premises under the act of Congress of July 2nd, 1864.

VII.

The court erred in refusing to hold and decide that the Northern Pacific Railroad Company never made a valid selection of the premises for indemnity purposes.

VIII.

The court erred in refusing to hold and decide that the plaintiff in error was not the owner in fee of the premises.

IX.

The court erred in refusing to hold and decide that defendants in error had no estate, right, or title in or to the premises.

X.

The court erred in holding the patent for said premises issued to plaintiff in error was void.

XI.

The court erred in refusing to hold and decide that the defendants in error wrongfully and unlawfully withhold possession of said premises from plaintiff in error, and in refusing to hold and decide that plaintiff in error was entitled to judgment against de-
158 fendants in error for the rents, issues, and profits of said premises.

Wherefore the said Fred Hewitt, the plaintiff in error, prays that the order and judgment of the supreme court of the State of North Dakota be reversed and the said supreme court be ordered to enter an order affirming in all things the decision and judgment of the trial court.

JAMES A. KELLOGG,
Attorney for Plaintiff in Error.

159 On the 23rd of January, 1899, there was filed in said court an undertaking on appeal or writ of error; which undertaking is in words and figures as follows, to wit:

Know all men by these presents that we, Fred Hewitt, as principal, and S. J. Vidger and Alex. Stern, as sureties, are firmly bound unto Emil Schultz and Friederika Schultz in the full and just sum of two hundred and fifty (250) dollars, to be paid to the said Emil Schultz and Friederika Schultz, their successors and assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our hands and dated this 23rd day of December, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, in the supreme court of the State of North Dakota, in a suit pending in said court between Fred Hewitt, plaintiff, and Emil Schultz and Friederika Schultz, defendants, judgment was rendered against the said plaintiff, and the said plaintiff having obtained a writ of error and filed a copy thereof in the office of the clerk of said court to reverse the judgment in the aforesaid suit, and the citation directed to the said Emil Schultz and Friederika Schultz, citing and admonishing them to be and appear at the Supreme Court of the United States, at Washington, on or before the 10th day of March, 1899:

Now, the condition of the above obligation is such that if the said Fred Hewitt shall prosecute the said writ of error to effect and answer all damages and costs if *it* shall fail to make *its* plea
160 good, then the above obligation to be void; otherwise to remain in full force and virtue.

FRED HEWITT, [SEAL.]
By JAMES A. KELLOGG,
His Attorney.
S. J. VIDGER. [SEAL.]
ALEX. STERN. [SEAL.]

Sealed and delivered in presence of—
C. D. AUSTIN.
A. W. McCLAIAN.
D. G. MACLAY.

Approved by—
J. M. BARTHOLOMEW,
Chief Justice of Supreme Court, State of North Dakota.

161 STATE OF NORTH DAKOTA, } ss:
In the Supreme Court, }

I, R. D. Hoskins, clerk of the supreme court of the State of North Dakota, in pursuance *to* the mandate of the writ of error heretofore attached, wherein Fred Hewitt is plaintiff in error and Emil Schultz and Friederika Schultz are defendants in error, do hereby certify that the above and foregoing, being pages numbered from one (1) to one hundred and sixty (160), inclusive, are full, true, correct, and complete copies of the original record on appeal from the district court of the county of Sargent, in the State of North Dakota, of the minutes of the said supreme court of the State of North Dakota, the judgment and opinion of said court, petition for writ of error, assignments of error, and undertaking in the said action, and the same are transmitted to the Supreme Court of the United States pursuant to said writ of error.

In testimony whereof I have hereunto set my hand and affixed the seal of the said supreme court of the State of North Dakota, at Bismarck, this 7th day of March, A. D. 1899.

[Seal Supreme Court, State of North Dakota.]

R. D. HOSKINS,
Clerk of the Supreme Court of North Dakota.

Endorsed on cover: File No., 17,336. North Dakota supreme court. Term No., 241. Fred Hewitt, plaintiff in error, *vs.* Emil Schultz & Friederika Schultz. Filed March 28th, 1899.

Office Supreme Court U.
FILED
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JAMES H. McKENN

No. 34.

Br. of J. H. McGowan & Kellogg for

Supreme Court of the United States

Filed Oct. 8, 1900.

OCTOBER TERM, A. D. 1900.

No. 34

FRED HEWITT,

Plaintiff in Error.

vs.

EMIL SCHULTZ AND
FRIEDERIKA SCHULTZ,

Defendants in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

J. H. McGOWAN,
JAMES A. KELLOGG,
C. D. AUSTIN,
Attorneys for Plaintiff in Error.

SUMMARY IN ORDER OF DATES.

1864. July 2. Original grant to Northern Pacific.—13 Stat. 365.

1870. May 31. Joint resolution making a second indemnity belt.—16 Stat. 378.

1872. Mar. 30. Map of *general* location filed and order of withdrawal made. (Rec. p. 31.)

1873. June 11. Map of *definite* location filed and alleged executive order of withdrawal made. (Rec. pp. 32, 33.)

1882. April 10. Hewitt settled upon and improved the tract involved. (Rec. p. 40.)

1882. July 12-27. Township surveyed. (Rec. p. 41.)

1882. Oct. 13. Plat of survey filed at Fargo. (Rec. p. 41.)

1882. Nov. 2. Hewitt filed his D. S. No. 11747 at Fargo. (Rec. p. 40.)

1883. Mar. 19. Railroad Co. filed at Fargo list of selections "in bulk" embracing the tract in controversy. (Rec. p. 34.)

1883. Apr. 4. Hewitt submitted final proof and tendered government price. (Rec. p. 40.)

1883. Apr. 9. Certificate of Register and Receiver Fargo Land office to list of selections. (Rec. p. 35.)

1883. May 28. Circular of instructions issued by H. M. Teller as to adjustment of the grant. (Rec. p. 35.)

1884. June 21. Defendants purchased the land while Hewitt was in possession; ousted Hewitt from possession. (Rec. p. 42.)

1885. Aug. 4. Lamar issued circular of instructions requiring "tract for tract" selection. (Rec. p. 36.)

1887. Aug. 15. Order revoking all alleged withdrawals of indemnity lands. (Rec. p. 33.)

1887. Oct. 12. Company specified basis for Mch. 19, 1893, list. (Rec. pp. 36–37.)

1888. Sept. 25. Commissioner allows Hewitt's final proof and holds company's selection for cancellation. (Rec. pp. 40–41.)

1892. Feb. 23. Company filed a re-arranged list—"tract for tract" selection. Tract in controversy selected for S. E. 21–44–9, Wisconsin. (Rec. p. 37.)

1894. Aug. 11. Secretary affirms Commissioner's decision and cancels company's selection. (Rec. p. 42.)

1894. Nov. 30. Hewitt paid for the tract and received the final certificate from the Register and Receiver.

1895. June 22. Patent issued to Hewitt. (Rec. p. 42.)

1895. Nov. 14. Secretary decided that the Company was not entitled to any lands East of Superior City, Wisconsin. (Rec. p. 38.)

1895. Nov. 26. Company specified as a new basis for its selection of the tract in controversy, the N. E. 1-3-33, Montana. (Rec. pp. 38-39.)

Supreme Court of the United States

OCTOBER TERM, A. D. 1900.

No.....

FRED HEWITT,

Plaintiff in Error.

VS.

EMIL SCHULTZ, ET AL.,

Defendants in Error.

BRIEF AND ARGUMENT FOR PLAINTIFF IN ERROR.

STATEMENT.

This case comes here from the Supreme Court of the State of North Dakota. It is a case in ejectment commenced in the District Court for Sargent County and tried before the District Judge without a jury, judgment being rendered for the plaintiff. The facts were stipulated, and found by the court exactly as stipu-

lated, and are set out in the record on pages 44 to 59 inclusive.

They show in substance, that the plaintiff, Hewitt, settled upon the northeast quarter of section thirteen (13) in township one hundred and thirty two (132) north, of range fifty seven (57), west of the Fifth Principal Meridian, on the 10th of April, 1882, and improved the tract with the determination to secure the same under the preemption laws; that he was duly qualified to acquire lands under said laws, and November 2, 1882, presented to the Register and Receiver of the United States Land Office at Fargo, his declaratory statement, which was duly received and numbered 11747 and receipted for and placed among the records of said office (Finding X Rec. p. 56); that he resided upon and cultivated the land as required by law from this said 10th day of April 1882, to the 4th day of April, 1883, when he submitted final proof and tendered payment as required by law, which proof and tender was rejected by the Register and Receiver, assigning as a reason therefor that the land had been withdrawn from entry under the grant to the Northern Pacific Railroad Company made by the act of July 2, 1864; that he appealed from such rejection to the Commissioner of the General Land Office who affirmed the decision of the District Land Office October 2, 1883 (Finding XI Rec. p. 56), but afterwards in September 1888, upon a motion for a review, set aside said affirmatory decision, and ordered that Hewitt's final proof should be

admitted on the ground that there had been no legal withdrawal of the lands within the indemnity limits of said road, wherein the land in question was located, and directed that the alleged selection which the Company made March 17, 1883, should be cancelled (Finding XI Rec. pp. 56–57).

The railroad company appealed from this decision to the Secretary of the Interior, who, by his decision of August 11, 1894, affiirmed the decision of the Comissioner, and subsequently, to-wit; June 22. 1895, a patent for the tract was duly issued to the plaintiff in error, (Finding XI Rec. p. 58).

The findings of fact further show that following the grant to the Northern Pacific Company of July 2, 1864, (13 Stat. 366) the Company filed its map or general location March 30, 1872, (Finding IV Rec. p. 47) and map of definite location June 11, 1873 (Finding V Rec. p, 48) ; that upon filing the map of general location the Secretary directed the withdrawal from sale, location, etc., of the odd numbered sections of land falling within 40 miles on either side of said line, (Finding IV Rec. p. 47) and upon the filing of the map of definite location, the acting Commissioner of the General Land Office under date of June 11, 1873, directed the withdrawal from sale, etc., of the odd numbered sections that should be found within 40 miles on either side of this line, being the lands within what is termed the granted limits, and also the withdrawal of the odd-numbered sections lying between the forty

and fifty mile limits, that is, within the indemnity belt (Finding V Rec. p. 49). During the month of July, 1882, the township embracing the tract in question was surveyed, and Oct. 13, 1882 the plat of survey filed in the Fargo Land Office. (Finding XI Rec. p. 57).

On March 16, 1883, (Finding VII Rec. p. 50) the railroad company filed at Fargo its first list of selections, which list was in bulk embracing all the odd-numbered sections within the indemnity limits in said land district and without designating any corresponding losses within the granted limits. The tract in question was embraced in said list.

At the time of filing said list of selections, and for a long time previous thereto, the land department requited a statement of losses in place to accompany the list of selections—designating losses and selections "tract by tract." But something more than two months after said list was filed, the secretary issued a circular of instructions in which the local officers were to be directed "that when clear lists of selections free from conflict or other objection," were filed with and approved by them, they should be sent to the General Land Office, which office was to ascertain the land lost in place, "instead of requiring preliminary lists of such lost lands, together with the indemnity lands, tract for tract from the company as *heretofore.*" (Finding VII Rec. p. 52.

On June 21, 1884, while Hewitt was in possession cultivating and improving the tract, the

railroad company made the alleged sale to one of the defendents in error, Emil Schultz, who proceeded to oust Hewitt, and has since kept the possession of the premises. (Finding XIII Rec. p. 58).

On the 4th of August, 1885, the secretary (Lamar) issued a circular of instructions directing that before admitting railroad indemnity selections in any case the local officers should "require preliminary lists to be filed specifying the particular deficiencies for which indemnity is claimed;" "should then carefully examine their records tract by tract, to ascertain whether the loss to the grant actually exists as alleged, and directing that no indemnity selection should be admitted, without a proper basis therefor." If the local officers were in doubt whether the company was entitled to indemnity for losses claimed, they were to transmit the lists to the General Land Office for instructions. (Finding VII Rec. p. 52).

When indemnity selections had theretofore been made without specification of loss, the companies were required to designate the deficiencies for which such indemnity was to be applied before the selection would be allowed. The selecting agent was required to state under oath that the specified losses for which indemnity was claimed were truly set forth and described in said list, and that said losses had not theretofore been indemnified in any manner. The instructions also required that "the lieu selections must be made from vacant unappropri-

ated land within proper sections and limits NEAREST THE GRANTED SECTIONS IN WHICH THE LOSS OCCURRED." (Finding VII Rec. p. 52.)

On the 15th of August, 1887, an order was duly issued by the Secretary of the Interior revoking the alleged order of withdrawal of the odd numbered sections within the indemnity limits issued by the Acting Commissioner on the 11th of June, 1873, (Finding V Rec. p. 49).

On the 12th of October, 1887, the company, not having withdrawn the "bulk list" of selections filed by it in the Fargo office on the 19th of March, 1883, filed a list of alleged losses within the place limits, designating an amount of lands equal to those set out in the latter list, but not setting out losses and selections tract for tract, (Finding VII Rec. p. 52), and more than four years later, to-wit, February 23, 1895, the company filed what is designated a "re-arranged list," in which was set out the lands said to have been selected by its list of March 19, 1883, and having therein set opposite each description so selected, the description of a tract of equal area said to have been lost from the grant in place, and opposite the tract now in question was described the SE ¼ of Sec. 21, T. 44 N. of R. 9, W of 4th P. M. Wisconsin. (Finding VII Rec. p. 53).

On the 14th day of November, 1895, the Secretary decided that the company was not entitled under the granting act to take lands in Wisconsin east of Superior City. Thereupon, on

November 26th, 1895, the company specified a new basis for the tract in controversy, being the NE ¼ of Sec. 1, T. 3 N. of R. 33, in the State of Montana, at the same time protesting its right under its grant to land east of Superior City (Finding IX Rec. pp. 54-55).

The VIII finding sets out a copy of an alleged certificate by S. W. Lamoreaux, Commissioner of the General Land Office, made May 2nd, 1896, stating that he had caused an examination to be made of the records of the office relative to the grant to the Northern Pacific Co. under the Acts of 1864 and 1870, and that the records showed that the lands excepted from and lost to said grant within its primary limits were 10,-624,746.27 acres, and that there were in the first indemnity limits not to exceed 7,065,523.49 acres which would be available when surveyed for selection, leaving a deficiency of 3,559,222.78 acres which could not be satisfied from the first indemnity. (Finding VIII Rec. p. 53.)

The findings further disclose that when Hewitt offered his final proof on the 4th of April, 1883, his improvements consisted of a frame house, 16 x 16 feet, stable 10 x 12 feet, and 20 acres of ground broken, the value being estimated at $350 (Finding XI Rec. p. 57); that on June 21, 1884, he was "residing upon and in actual possession of the tract and every portion thereof and had valuable improvements thereon" (Finding XII Rec. p. 58); that on the last named date Schultz made the alleged purchase from the railroad company and paid therefor $1200,

(Finding XIII Rec. p. 58), and that neither party has since attempted to sell their rights, or supposed rights, in the premises (Finding XIV Rec. p. 59).

The alleged selection has never been approved by the Secretary of the Interior or any official of the government nor has any department of the government ever made certification that the company was entitled to said tract or letters patent for the same, and the said alleged selection was duly cancelled by the Secretary on August 11th, 1884. (Finding VII Rec. p. 53).

A summary of facts and dates involved in this case arranged chronologically, will be found on the first pages of this brief.

It is thus disclosed by the stipulation and findings:

1. That Hewitt was qualified to take land under the preemption law of 1841, mentioned in the granting act.

2. That on his part and on the part of the land officers the requirements of that law were complied with up to and including the issue to him of the patent.

3. That he had settled upon the tract and improved it, and had filed his declaratory statement prior to any attempt whatever upon the part of the railroad company to select the same.

4. That Hewitt submitted final proof and tendered the government price of the land more than four years before the railroad company filed any list of losses as a basis for selecting the tract in question.

5. That before the company filed any list of losses in place as bases for selections, which selections included the Hewitt tract, the Teller circular of instructions had been replaced by the LeMar circular requiring a "tract for tract" selection.

6. That before the company filed any such list of losses the alleged order of withdrawal of the indemnity limits made by the Acting Commissioner, had been revoked by the Secretary of the Interior.

7. That the company specified the Montana tract as a loss in place for which it desired to select the land in question on November 26, 1895, but that Hewitt had paid for the land a year prior to that date, to-wit, Nov. 30, 1894, and the patent had issued to him five months prior, to-wit, June 22, 1895.

8. That the company's selection of the N. E. 13 T. 132, N. of R, 57 W. as a lieu tract, has never been approved.

We add here such portions of sections three and six of the original act making the grant to the Northern Facific as are necessary for reference in the argument.

Sec. 3. "And be it further enacted, that there be, and hereby is granted to the 'Northern Pacific Railroad Company', its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, mu-

nitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissioner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or preempted or otherwise disposed of, other lands shall be selected by said company in lieu thereof under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections." * * * * *

Sec. 6. "And be it further enacted, that the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or

preemption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty one, granting preemption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain' approved May twenty, eighteen hundred and sixty two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company, and the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale."

ARGUMENT.

Plaintiff in Error Claims,

1. That his title to the land under his patent from the United States is valid and unimpeachable.

2. The Railroad Company had no right to or interest in this land which could limit plaintiff's right to acquire title.

3. The order of the Acting Commissioner of the General Land Office directing the Register and Receiver to withhold from sale or entry the odd numbered sections within the indemnity limits, was without authority and void.

4. That if such order should be found legal, it must still be held that it was liable to revocation either in whole or in part, and that after revocation, the odd sections, free from other claims were open to settlement.

5. That the Railroad Company never made a valid selection of the tract, the alleged selection was void, and the company has not now and never did have any title.

I.

Plaintiff's title to the land under his patent from the United States is valid and unimpeachable.

The land was public land; it was subject to entry; plaintiff fully complied with the law in that regard, and his patent gave him full and complete title.

That the act making the land grant to the Northern Pacific Railroad Company did not in any respect obstruct the preemption of this land, is plain from the provisions of the act itself.

Section 6, after providing that the odd sections of land granted to the Railroad Company, meaning the lands within the "place limits" of the grant, "shall not be liable to sale, or entry,

or preemption, before or after they are surveyed, except by said Company, as provided in this act," goes on to further provide, affirmatively and industriously, as follows:

"But the provisions of the act of September, Eighteen hundred and Forty-one, granting preemption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, Eighteen Hundred and Sixty- two, shall be, and the same are hereby extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said Company."

The land department as well as this court have repeatedly held that "granted" lands as that term is employed in the granting act are those lands within the *place limits* and does not embrace "indemnity" lands or lands within the indemnity limits. One of the early decisions of the department upon that question was made by Secretary Lamar in *Atlantic and Pacific R. R. Co. 6 L. D. 84, 86, 87;* and a later case is *Northern Pacific Railroad Company vs Miller 7 L. D. 100.*

In the following case the Court designates "place" lands as "granted" lands.

"The companies were allowed to select, under the direction of the Secretary of the Interior, in lieu of the lands disposed of in either of these ways, an equal number of odd sections nearest to those *granted* and within twenty miles of the line of the road. Having thus given lands in place and by way of indemnity, Congress ex-

pressly declared, what the act already implied, that lands otherwise appropriated when it was passed were not subject to it."

Leavenworth, etc., R. R. Co. v. U. S. 92, U. S. 733, 748.

That part of Sec. 6 above quoted is an equivocal declaration of the will of Congress, that all other lands on the line of said road, besides those in the "place limits" which were *granted* to the Company, should be, when surveyed, open to settlement and entry under the pre-emption and homestead laws of the United States.

It seems too clear for argument, that in the same section of the act, Congress provided first, that "The odd sections of land hereby granted *shall not* be liable" to any other claims than those of the Company, and second, that all the other lands on the line of the road *shall* be liable to preemption or homestead entry. "All other lands on the line of said road" must of necessity include all the lands, both odd and even numbered sections, within the limits named in section 3 of said act, other than those *granted* to the company.

This positive assurance in the act of Congress is a bulwark against all the objections which ingenious counsel can raise to the patentability of the land in question. It broadly distinguishes this case from each and every one of those cited in defendant's brief, from which a contrary inference is sought to be drawn.

This court will look in vain for any well considered decision of a court, which even remotely suggests that the Land Department could in any way override or even embarass the right of pre-emption entry to land situated like that in this case.

This feature of the case lies at the basis of the decision of the Secretary of the Interior, in the case of *Northern Pacific Railroad Company vs. Miller, 7 L. D. 100.* In that case as in this, the land in question had not been granted to the Railroad Company by its charter, but was land within the indemnity limits named in the charter, as to which the company had only a contingent right of selection. Of this feature of the case, it was said by Secretary Vilas:

"The granting act did not only not authorize a withdrawal of lands in the indemnity limits, but forbade it. * * " (P 120) "It was explicitly provided that the provisions of the pre-emption and homestead laws 'shall be, and the same are hereby extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company.' If the lands within the indemnity limits are to be regarded as 'on the line of said road', this declaration appears to me prohibitory of any withdrawal for the benefit of this road. * * * It gave to any person entitled under the pre-emption or homestead law to take any such lands, the absolute right to acquire any proper quantity thereof, in accordance therewith, and this right an executive officer could not deprive the settler of. The act as much makes that his right, as it makes it the right of the company to take the others." (p. 122)

The reasoning and the conclusions of this opinion are unassailable. Since it was pronounced by Secretary Vilas in 1888, it has stood as the law governing the action of the land department in all similar cases, and its rules have frequently been applied in contests before the Department of the Interior.

The Supreme Court of the United States justifies this conclusion of Secretary Vilas, when it says in a recent case:

"The action of the land department cannot override the expressed will of Congress."

Burfenning vs. Ry Co., 193 U. S. 351.

It will be seen that Secretary Vilas, in reaching his conclusion as above set forth, quoted liberally from the decisions of the Supreme Court of the United States, and an examination of these authorities shows that he made from them the proper deductions, and that they justified the conclusions which he reached. His decision in the Miller case was recognized as authoritive, and was followed by Secretary Noble in *N. P. R. R. Co. vs Fugelli, 10 L. D. 288* and *Spicer vs. N. P. R. R. Co., 10 L. D. 440.*

Later the decision in the Miller case has been examined anew by Secretary Smith, and has been expressly re-affirmed in *Davis vs. N. P. R. R. Co,, 19 L. D. 87* in which the language of Secretary Vilas in the Miller case was repeated and adopted, and Secretary Smith added:

"It would seem, therefore, to follow logically, when it was commanded that the pre-emption and homestead laws be extended to 'all other lands', it was all those lands within the limits of the grant, whict had not been otherwise disposed of by the act. The 'other' lands within the limits of the grant were the reserved sections, and the odd and even section, within the indemnity limits, and it is clear to my mind that Congress meant all of those lands, for 'all' other lands surely cannot mean only a portion of the other lands. *Qui omne dicit, nihil excludit,* is a maxim well recognized in the construction or statutes, and is applicable here."

Secretary LaMar so construed this feature of the granting act in *Atlantic and Pacfic Railroad 6 L. D. pp. 86-87.*

Secretary Smith further quotes from the opinion of Secretary LaMar, in the said case of the *Atlantic and Pacific Railroad, 6 L. D. 87* where the Secretary said of another grant in similar terms and with similar provisions:

"Were I called upon to treat as an original proposition the question as to the legal authority of the Secretary to withdraw from the operation of the settlement laws lands within the indemnity limits of said grants, I should at least have such doubts of the existence of any such authority as to have restrained me of its exercise. It would seem that the very words of the act, 'the odd numbered sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this act,' of themselves indicate most clearly the legislative will that there should not be withdrawn for the benefit of said company from sale or entry any other lands except the odd numbered sec-

tions within the granted limits, as expressly designed in the act. But when the provision following this, in the very same sentence is considered—'but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'an act to secure homesteads to actual settlers upon the public domain,' approved May 20, 1862, 'shall be and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company'—it is difficult to resist the conclusion that Congress intended that 'all other lands excepting those hereby granted to the company' shall be open to settlement under the pre-emption and homestead laws, and to prohibit the exercise in the matter of determining what lands shall or shall not be withdrawn." * * *

It is hardly necessary in this case to invoke the familiar rule for the construction of legislative grants: "Nothing passes by such but what is conveyed in the act making the grant in clear and unambiguous terms. Such a grant must be strongly construed against the grantee."

N. P. R. R. Co. vs Sanders, 46 Fed. 239, 250.

Counsel for defendants in error claim that without the withdrawal of June 11th, 1873, the right of selection would have been a barren right. That statement is not justified by law, and section 6 of the act of July 2nd, 1864, as we have seen, does not extend the right of pre-emption and homesteads to the indemnity lands until ***after the survey*** thereof; before the survey no rights can attach to these lands under the law, by settlement and improvement or other-

wise; as soon as the survey was made the company could select such of said lands as it might be entitled to, to indemnify it for losses in the "place limits," and the remainder of such indemnity lands, if any, become subject to entry as aforesaid.

If the company neglects to make selection of the indemnity lands at once after the survey, and the rights of settlers should intervene between the date of the survey and the date of the selection, who should suffer but the company? Is it not reasonble to require the company to select the indemnity lands immediately upon the survey, and in the event of its negligence in the exercise of that privilege if the rights of the settlers should intervene, should the company be heard to complain? Fully eighteen years elapsed between the date of the grant and that of the survey of the said township, and here was abundance of time to have ascertained and listed the losses in the place limits and been ready to have made the lieu selections at once. Congress, by Section 6 aforesaid, provided that ***when surveyed***, the indemnity lands should be immediately liable to selection by the company, and that the lands not previously selected should be appropriated to the first legal applicant under the pre-emption and homestead laws. The company did not make a pretended selection of the land in controversy until about nine months after the township was surveyed, and over five months after the plat of survey thereof had been filed in the local land office.

First come, first served. Prior in time, prior in right.

Sheply vs Cowen, 91 U. S. 330.
N. P. R. R. Co., vs. Meyer, 9 L. D. 250.

Patent relates to inception of the title, therefore, person first appropriating land has best title in equity.

Taylor vs. Brown, 5 Cranch, 234.
Stark vs Starrs 6 Wall 402.

Why should the Department of the Interior, even if it had authority, withdraw from settlement and entry the indemnity lands after survey, and withhold the same for an indefinite time, awaiting the pleasure of the company in making selections thereof? There is no reason for such action, and it would be manifestly unjust to the home-seeker, at well as a detriment to the welfare of the country, to tie up the whole of the indemnity lands to await the convenience or caprice of the company in making selections from the same.

The policy of withdrawing lands and withholding them for long terms from sale and settlement has long since become reprehensible to both the judicial and legislative authorities.

In speaking of the withdrawal of indemnity lands the Court says in *St. Paul R. vs Winona R 112 U. S. 720, 732.*

"It (the withdrawal) by no means implies a vested right in said company, inconsistent with the right of the goverment to sell, or of any

other company to select, which has the same right to selections within those limits. Each company having this right of selection in such cases, and having no other right, *is bound to exercise that right with reasonable diligence;* and when it is exercised in accordance with the statute, it becomes entitled to the lands so selected. The unascertained float then becomes a vested right to an identified tract of land."

The observations of the Court in the case of *Northern Pacific R. R. Co. vs. Musser-Sauntry L. L. & Mfg. Co., 168 U. S. 604, 610,* are peculiarly applicable to the grant to the Northern Pacific Company and gives as a reason why promptness on the part of the company in building its road would result to its advantage in finding all its grant within the place limits. The Court says:

"At the time of the passage of the act of 1864 only in the vicinity of the proposed eastern and western termini were there any settlements. The great bulk of the territory through which the road was to pass was almost entirely unoccupied. Congress, fixing the time for commencing and for finishing the work within two and twelve years, respectively (section 8), contemplated promptness in the construction of the road, intending thereby to open this large unoccupied territory to settlement. In view of the road traversing a comparative wilderness, it made a grant of enormous extent. Within the unoccupied territory thus to be traversed there were few settlers, and few, if any land grants. It knew therefore, *that if the company proceeded promptly, as required, it would find within its place limits nearly the full amount of its grant.*"

It is against the settled policy of Congress that the indemnity lands should be withdrawn from entry by actual settlers, for an indefinite time.

N. P. R. R. Co. vs Sanders, 46 Fed. 239, 248, 249.

Even if the withdrawal had been valid it did not confer a vested right upon the Company.

But, whatever may be said as to the Congressional policy, it is only necessary here to observe that the legislative will seems clear. The principle followed by the Secretaries of the Interior Department, in their decisions above noted, must, it seems to us, prevail, to-wit, that the executive department cannot arbitrarily suspend the operation of the statutes, or contravene a distinct mandate of law. When Congress has legislated exhaustively and definitely as to the mode of disposition of indemnity lands, the executive department has no power to nullify such law. It having been enacted that the indemnity lands should be subject to entry *when surveyed* the action of the president in ordering such lands withdrawn from entry *after survey* would simply render the statute nugatory. The Interior Department, in the decisions above quoted, declines to suppose that any such power could be properly attributed to the Executive.

There, was then, no "proclamation of the President" reserving or withdrawing these indemnity lands from entry; and section *2258* of the U. S. statutes has no application to the case.

The sixth section of the granting act opens

the odd sections within the indemnity belt to preemption entry, when surveyed, as well as to selection, and that, as the said lands are appropriated to these two purposes, the land department cannot defeat either purpose by attempted withdrawals. If these lands are thus appropriated the following cases distinctly hold that the appropriation cannot be defeated.

Wright vs. Rosbeberry, 121 U. S. 488, 519.

Davis Admr. vs. Weibold, 139 U. S. 509, 528.

In Moore vs. Curmode, 20 Wash. 805 (55 Pac. 217) the court in a well considered case involving this identical withdrawal, held that indemnity land within the grant to the N. P. Company was subject to entry regardless of the departmental withdrawal, the Court saying:

"Under the land grant to the Northern Pacific Railroad Company (13 Stat. at Large, 365) of alternate sections for forty miles on each side of the line as located, and, in case of prior selection by settlers, granting the company the right to select in lieu thereof alternate sections from indemnity lands lying not more than ten miles beyond the original grant of place lands, the grant as to lands in the indemnity limits did not take effect until actually selected by the company, and prior thereto such lands *were open to settlement.*"

The land in question was, therefore, subject to entry, and plaintiff's patent must be sustained.

II.

The Railroad Company had no right or interest in this land which could limit Plaintiff's right to acquire title.

As between the railroad company and ordinary settlers upon the public lands, the last named were preferred. The lands actually granted to the railroad company were assured to it in the utmost good faith; but beyond that, the privileges of the railroad company were subordinate.

Following the general policy of the United States Government in its grants of lands to railroad companies, the charter of this company, as to all public lands referred to in it, gave preference to the preemptors and homestead settlers, down to the time when "the line of said road is definitely fixed." (Sec. 3.)

Until such line was definitely fixed, the usual rights of preemption and homestead settlement and entry remained unaffected by the land grant. Upon the filing of the map fixing the line of the road, the law withdrew from settlement the granted lands situated within the place limits.

Buttz vs. N P. R. R. Co., 119 U. S. 55, 71.

The indemnity belt was created for the purpose of establishing limits, within which selections might afterwards be made to indemnify

the company for the lands which would become exempted from this grant within the original belt by reason of such other appropriation thereof. It would naturally follow that Congress would, as to the land within the indemnity belt, pursue the same general policy of preferring preemption and homestead settlers. Accordingly the act provides that the railroad company has, until its selection of indemnity lands within the indemnity belt no property or interest in any such lands, but only a power to make therefrom, under certain limitations, selections to meet the contingency of its losses within the granted limits.

This grant to the N. P. R. R. Co. is limited "to such alternate odd sections as have not, at that time (the definite location) been reserved, sold, granted, or otherwise appropriated, and are free from preemption, grant, or other claims or rights."

Buttz vs. R. R. Co., 119 U. S. 55, 71.

"Congress intended to give to actual *bona fide* settlers priority to the Railroad Company."

Ry. Co. vs. Greenhalgh, 26 Fed. Rep. 563, 568.

As to the land in the indemnity limits, that which was conferred upon the company by its charter was simply a privilege, contingent in its nature, to make, under certain limitations, selections for the purpose of indemnity. The act is devoid of any intent to give to the Railroad Company any right or interest in any of the indemnity lands prior to such selection, and be-

fore any right attaches to a special tract the selection must not only be actually made by the company, but affirmatively approved by the Secretary of the Interior.

It is scarcely necessary to argue, or to cite authorities to show that this right of the Railroad Company was merely a power, which required actual selection in conformity to the prescribed conditions and limitations, in order to vest any right in the company. But authorities are not wanting.

In Grandin vs LeBar, 57 N. W. 243 the Court says:

"But this privilege did not constitute a present grant. It vested in the Railroad a right through and by which, in the contingency specified, it might acquire title to the additional or indemnity lands."

"The selection segregates the land, and, if approved, cuts off all claimants ***subsequent to such selection.*** But it does not pass title. A grantee cannot pass title to himself. ***This grant, as we have seen, did not pass title. It gave only a right to select.*** It requires the ***approval*** of the selection to pass title. It will not do to say the selection itself, where the land is subject to selection and a corresponding loss exists, passes title. The law does not so declare and land titles must not rest upon a foundation so uncertain."

I should analyze the provision of the granting act relating to selections in the indemnity limits somewhat diffierently, but reaching practically the same conclusions.

The word "selected" or, to give it the nomi-

native, "selection" embraces everything to be done in the premises by the railroad company and the Secretary. It is "the selection" in this broader sence that is meant and that determines the title in the company.

First, the company must determine the losses by tracts, i. e. by the "sections or parts of sections" and record or list them. This would be necessary to prevent frauds. If the particular tracts alleged to be lost were not so described that they could be identified, the Secretary could not determine whether or not the losses had actually occurred. He could not give the required "direction."

Second, the tracts chosen by the company in lieu of the losses, must also be described and listed, or the Secretary cannot determine whether or not they are free from other appropriation.

Third, and finally, these lists must be examined and approved "under the direction of the Secretary of the Interior."

These three elements uniting, the "selections" is complete and the title passes to the company. The action of the Secretary is as necessary as that of the company, and there is no "selection" within the purview of the statute until the listing of losses and the listing of the tracts chosen in lieu have the stamp of his approval, officially denoting that all has been done under his direction. His acts in this regard are judicial, and

his judgment in favor of the company binds the government. It also binds the grantee.

As a striking illustration of the neccessity of a "tract for tract" selection, I call attention to the statement made by Secretary Vilas in the Guilford-Miller case found on page 124. It will be seen that the Northern Pacific Co. made a selection of lieu lands aggregating 58,000 acres without specifying losses. Of this selecting the Secretary states that when the Company, some years afterwards, was called upon to specify particular lands lost from the granted limits, for which this right of selection could exist, only 4,011 acres were shown, except by claiming in-d emnity for about 55,000 acres of lands, for the most part not particularly defined, lying within the *Wakima* Indian Reservation. After showing that this particular Indian Reservation might or might not fall within the primary limits when the grant was finally adjusted, the Secretary calls attention to the decision in *Buttz v. Northern Pacific R. R. (119 U. S. 71)* wherein it is held that Indian Reservations in this grant are not excepted out of the grant and the lands pass to the Company *in fee*, subject to the Indian right of occupancy, which the Government will at is pleasure extinguish.

The Secretary further says, in discussing this matter of selection, that there was a practice permitted for sometime in the General Land Office, by which Railroad Companies made selections in lieu of lost lands without the specification of specific losses, and by this means pro-

cured certification of lands much in excess in acreage of their losses for which selections were admissable. I do not understand that the Teller circular of May 28, 1883, could, if properly administered, have led to any such result. It would appear that the Secretary, in that circular, had in mind only to expedite the adjustment of the grant, but not to waive his right of supervision of selections and losses, "tract by tract." The circular simply undertakes to put a portion of the work of selection upon the land officers, a portion that had theretofore been required of the Company; and there is no evidence in the record wherein lists filed under this circular was approved without the corresponding losses having been ascertained and compared and the completed selections thus made up had the approval of the Secretary.

But this matter is so fully and effectually disposed of by this court in *Wis. Cent. R. R. Co. v. Price County, 133 U. S. 496, 511, (33 L. ed 687)*, that further discussion is unnecessary. Justice Field announced the opinion of the court, and in referring to the selection of lieu lands under a provision of the grant requiring such selections to be approved by the Secretary of the Interior, he says:

"For such lands no title could pass to the company, not only until the selections were made by the agents of the State appointed by the Governor, but until such selections were approved by the Secretary of the Interior. The agent of the State made the selections, and they had been properly authenticated and forwarded

to the Secretary of the Interior. But that officer never approved of them. Nor can such approval be inferred from his not formally rejecting them."

The approval of the Secretary was essential to the efficacy of the selections, and to give to the company any title to the lands selected. His action in that matter was not ministerial but judicial. He was required to determine, in the first place, whether there were any deficiencies in the land grants to the company which were to be supplied from indemnity lands; and in the second place, whether the particular indemnity lands selected could be properly taken for these deficiencies. In order to reach a proper conclusion on these two questions he had also to enquire and determine whether any lands in the place limits have been previously disposed of by the government, or whether any pre-emption or homestead rights had attached before the line of the road was definitely fixed. There could be no indemnity unless a loss was established. And in determining whether a particular selection could be taken as indemnity for the losses sustained, he was obliged to inquire into the condition of those indemnity lands, and determine whether or not any portion of them had been appropriated for any other purpose, and, if so, what portion had been thus appropriated, and what proportion still remained. This action of the Secretary was required, not merely as supervisory of the action of the agent of the State, but for the protection of the United States against an improper appropriation of their land. Until the selections were approved there were no selections, in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remained unaffected in their title. Until then, the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. The government was, indeed,

under a promise to give the Company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts. The doctrine, that until selection made no title vests in indemnity lands, has been recognized in several decisions of this court."

The court further cites—*Sioux City & St. P. Co. v. C. M. & St. P. Co., 117 U. S. 406, (29 L. ed 928)* as follows:

"No title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained, and the selection made approved by the Secretary of the Interior."

Also the opinion of the Attorney General in—*Lighthouse Site and Portage Land Grant*, found in *14 Ops. Atty-Gen. 50 & 645*, declaring:

"The uniform language is that no title to indemnity lands becomes vested in any company or in the State until the selections are made; and they are not considered as made until they have been approved, as provided by statute, by the Secretary of the Interior."

Also see *U. S. vs. Missouri etc. Railway, 141 U. S. 358, 375*, and list of cases therein cited:

"* * *Because as to lands which may legally be taken for purposes of indemnity the principle is firmly established that title to them does not vest in the railroad company, for the benefit of which they are contingently granted, but in the fullest legal sense, remains in the United States, until they are actually selected and set apart, under the direction of the Secretary of the Interior, specifically for indemnity purposes. It

was so held in *Kansas Pacific Railroad vs Atchinson, 112 U. S. 414, 421,* in which the court, referring to the above act of 1863, said in reference to the lands in the indemnity limits: 'Until selection was made the title remained in the government, subject to its disposal at its pleasure. * * * The grant to Kansas, as stated conferred only a right to select lands beyond ten miles from defendant's road, upon certain contingencies. It gave no title to indemnity lands in advance of their selection.' The same principle was announced In *Barney vs. Winona & St. Peter Railroad, 117 U. S. 228, 232,* where the Court said: 'In the construction of land grant acts in aid of railroads, there is a well established distinction observed between 'granted lands' and 'indemnity lands.' The former are those falling within the limits specially designated and the title to which attaches when the lands are located by an approved and accepted survey of the line of the road filed in the Land Department, as of the date of the act of Congress. The latter are those lands selected in lieu of parcels lost by previous disposition or reservation for other purposes, and the title to which accrues only from the time of their selection.' So in *Sioux City etc. R. R. vs. C. M. & St. P. Ry., 117 U. S. 406, 408:* 'No title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained, and the selection approved by the Secretary of the Interior.

This court in construing a charter in effect the the same as the granting act of the N. P. Company in the case of *Regan v. Railroad Co., 99, U. S. 382, 386* said: "under this statute, when the road was located and the maps were made, the right of the company to the odd sections first

named became *ipso facto* fixed and absolute. With respect to the "lieu lands", as they are called, the right was only a float, and attached to no specific tracts until the selection was actually made in the manner prescribed."

Upon the proposition that no rights vested in the Company as to any specific tract of indemnity land before selection and approval see:

Kansas Pacific R. R. Co. vs Atchison etc R. R. Co. 112 U. S. 414 (28 L. ed. 794.)

St. Paul etc., R. R. Co. vs Winona etc. R. R, Co.,112 U. S. 720, 731, 732, (28 L, ed. 872)

Barnes vs Winona etc. R.R.117 Co. U. S. 228

Grandin vs. La Bar, 57 N. W. 241, 243.

Wells County vs McHenry, 74 N. W. 241, 242.

Jackson vs La Moure County, 46 N. W. 449 (1 N. D. 238).

Moore vs Cormode, 20, Wash. 305, (55 Pac. 217),

III.

The Order of the Acting Commissioner of the General Land Office directing the Register and Receiver to withhold from sale or entry the odd numbered sections within the indemniy limits, was without effect to bring the case within section 3258 of the revised statutes.

Defendant insists that the plaintiff's patent is void, because of the order of withdrawal of the indemnity lands. The argument upon this point seems to be a *petitio principii*. It assumes that the order of withdrawal by the Acting Commissioner of the General Land Office, was a proclamation of the President, within the meaning of section *2258* of the Revised Statutes of the United States, and that the Acting Commissioner had power to promulgate such order. But this is assuming the very proposition which it is incumbent upon the defendants to prove, to-wit: that the President or any of his subordinates had authority to make such order.

Section *2258* names, among classes of lands which are not subject to the rights of preemption, the following: "First. lands included in

any reservation by any treaty, law or proclamation of the President for any purpose."

It is necessarily inherent in this provision of the statute that the treaty named must be one made by a competent constitutional authority, that the law named must be one made by Congress within its constitutional power, and that the proclamation of the President must be one which he has authority to make. If the President makes such proclamation without constitutional authority, it would be void. In the present case, is is fundamental to defendant's contention, that they shall show an order of withdrawal of the indemnity lands, made by Executive authority, and ***within the constitutional limits of Executive authority***. An order of the President, in direct violation of an act of Congress, would be ineffectual for any purpose.

We have seen in section **6** of the company's charter, a positive declaration by Congress, that the indemnity lands shall be subject to preemption. Where then can the Executive find authority or power to declare otherwise? To say, as defendant claims, that the land in controversy herein " is land included in a reservation by proclamation of the President", is to ignore the constitutional limits upon the Executive authority.

Among the abundant authorities cited by defendants, in support of their proposition, not one is found which involves the question here presented. In none of those authorities was there any question presented of an attempt by

the Executive authority to declare a withdrawal of lands from entry, in contravention of a provision of law of Congress.

The question of the general authority of the officers of the Land Department, to withdraw public lands from the act and operation of the general *law where there is no positive requirement of* Congress involved, is quite a different question from the one here presented. If the action of that department be in aid and affirmation of, and not in direct contravention of the declared legislative policy, different considerations would apply. In such cases, they might and would really sustain the Executive action. It is a part of Executive duty to execute the laws of Congress. In cases of doubt, it is not only proper but becoming that the Executive officers should so act as to effectuate the plain intent of the Legislature. It is out of decisions of the courts which have sustained the action of the Executive officers in such cases, that defendants endeavor to erect a bulwark for their proposition that the Executive may defy and nullify the positive provisions of an act of Congress.

Thus in *Wolcott vs Des Moines Co,, 5 Wall, 681,* there was no affirmative statutory require ment as in this case, and the order of withdrawal of lands from entry was sustained on the ground of doubt arising out of a *serious conflict of opinion* as to the longitudinal extent of the grant.

Woolsey vs Chapman; 101 U. S, 755, and *Riley vs Welles, 154 U. S. 578* resemble and are governed by the case of *Woolcott vs Des Moines Co.*

In Spencer vs McDougal, 156 U. S. 52, there was no statute forbidding the withdrawal, and the order of withdrawal in question was sustained upon similar grounds the doubts arising in view of the probable conflict of rights from the overlapping of two grants on lines yet undetermined. The only objection to the order in that case being that the commissioner withdrew too much land, and it was held that this was a matter within the discretion of the land office.

In R. R. Co vs Logging and Man'fg. Co., 163 U. S. 604, (18 Supreme Court Rep. 205,) no question was presented of a statutory prohibition. The case was one of an ordinary withdrawal of indemnity lands from entry.

In Wood v Beach 156 U. S. 548 cited by defendants on page 15 of their brief the withdrawal was made *under the direction of congress.*

In the recent case before Judge Thomas, *Thompson vs Railroad Co., 83 Fed. Rep. 546,* the question arose, not under the act of 1864, which is under consideration in this case, but under the resolution of Congress approved May 31, 1870, creating the *second* indemnity belt of of the N. P. R. R. Co. (16 Stat. 378.) This resolution contains no prohibition, either expressed or implied, against withdrawal, such as is found in the charter of 1864, respecting the land

in the *first* indemnity belt. The question here presented of course could not arise there. There having been an order of withdrawal on December 26, 1871, by the Commissioner of the Land Office, of the odd numbered sections in the indemnity limits, it was held that the withdrawal was valid as to the land in question, which lay wholly within the *second* indemnity limits created by the resolution of 1870.

A comparison between the language of section 6 of the charter of 1864, and that of the resolution of May 31, 1870, will show the difference in congressional policy as between the first and second indemnity limits. Not a word appears in the said resolution either in terms like the prohibition in section 6 of the charter of 1864 or implying anything similar. It is clear that Congress in 1870 conferred much larger privileges upon the railroad company, with respect to the lands within its second indemnity belt than were conferred upon it with respect to the lands in its first indemnity belt.

The decision of Judge Thomas is therefore entirely consonant with the view of Brewer J., in ***R. R. Co, vs United States, 36 Fed. Rep. 282,*** that the resolution of 1870 granted to this company privileges additional to and broader than those granted in the charter of 1864.

The attempt in defendant's brief to discover a conflict between the decision of Secretary Vilas in the *Guilford-Miller case 7 L. D. 100,* and that of Judge Thomas in *83 Fed. 546,* is not successful.

In fact the decision of Secretary Vilas in the Miller case stands unaffected by any judicial decision that has been brought to our attention.

IV.

That if such order of withdrawal should be found legal, it must be held that it was liable to revocation, either in whole or in part, and that after revocation, the odd sections, free from other claims, were open to settlement.

Assuming for the sake of argument that the Executive had the authority to withdraw the indemnity limits prescribed in this grant it will not be seriously denied that he had equal authority to revoke such order of withdrawal whenever he deemed the interests of all parties concerned required such revocation. Certainly from the date of such revocation the odd numbered sections, then free from claims, would be subject to selection by the railroad company, or subject to settlement or other claims exactly as if no withdrawal had been made.

Atlantic and Pacific R. R, Co. 6 L, D, 84,

On the 15th of August, 1887, an order was duly made by the Secretary, revoking all alleged withdrawals of indemnity lands, and on September 25th, 1888, the Commissioner allowed Hewitt's final proof and held the company's selection for cancellation, which decision was affirmed by the Secretary, and the selection finally cancelled August 11, 1894. Now when the revocation order was made, Hewitt's claim as a settler was pending, he had theretofore settled upon the tract, improved it, filed his declaratory statement, submitted his final proof, and tendered the Government price in payment for the land, and up to this date there had never been any *selection* made by the company as provided by the granting act. In fact the company never initiated any proper and legal selection of this land, as the law and the regulations required, until more than four years after the revocation of the alleged withdrawal; to-wit, on February 23, 1892, when it filed the so-called "rearranged list", being a "tract for tract" selection, which furnished as the basis for selecting the Hewitt tract a loss of similar amount in the state of Wisconsin, and subsequently, upon the decision of the Secretary that the company was not entitled to land east of Superior City, there was filed, Nov. 26, 1895, a new basis for the selection of the tract in controversy,—being the N. E. ¼ of Sec. 1, T. 3, R. 33, Montana. It is a fact then

that when Hewitt paid for the tract and received his final certificate from the Register and Receiver on Nov. 30, 1894, the alleged withdrawal had been revoked, the company's alleged selection had been cancelled, and so far as the Executive had the power to do so, the land was entirely free from any claim other than that of plaintiff.

It must go without saying that the Secretary had the power to revoke any withdrawal which he had made, and equally had the power to cancel any alleged selection that did not conform to the statutes and the proper regulations thereunder. This being true, it must be clear that from the time when the tract in question was free from any shadow of claim on the part of the Railroad company the whole question of its acquirement was between the settler and the Government,—a matter in which the company had no voice.

Hence, having conceded, for the purposes of argument, that Hewitt could not have initiated a legal settlement upon the land in 1882, yet when the land was entirely free and he was found upon it asserting his rights in good faith having complied so far as he could with the requirements of the pre-emption law, the Secretary could direct, under the equitable jurisdiction conferred upon him, that the claim be allowed and patent issued.

There is another view of this matter that should have consideration. It is this: If the power rested in the Secretary to revoke a with-

drawal, he certainly could revoke it, in whole or in part. It is undoubtedly true that in the administration of railroad grants it would frequently conduce to the ends of justice to revoke a part of an order of withdrawal, but allow it to stand as to other portions of the line. If this may be done, there would be no limit in area as to the portions that might be freed from the withdrawal, or the portion allowed to remain under it. If the Assistant Commissioner map bind the Secretary and the President in an order of withdrawal, I submit that theaction of the Register and Receiver in accepting the declaratory statement of Hewitt, giving his claim a number giving him the usual receipt in such cases, placing his application among the records of their office and reporting the same to the Commissioner of the General Land Office, where it remained without cancellation and without objection,—was equivalent to withdrawing the tract in question from the effect of any former withdrawal resting upon it. In this connection I call attention to the fact that Hewitt settled upon the land before it was surveyed and he filed his declaratory statement a few days after the plat of survey had been filed in the local office, and that these things took place before the railroad company took *any steps whatever* looking to the selection of the land.

In Railroad Co., vs Araiza 57 Fed. 102 it is said: "It is true the order of withdrawal made by the secretary on the 27th of March, 1867, had not been in terms vacated, but the secretary had the same power to vacate it that he had to make

it; and when he permitted Tilley to make his entry, and awarded the land in question to him, and issued him a patent therefore, he, in effect annulled the order of withdrawal so far as that particular piece of land was concerned. In doing so he violated no vested right of the complainant, for to that land the company had not then acquired any right of any nature. It had not selected it and might never do so. There was, therefore, no legal reason why he should not allow homestead entry. The act making the grant to the complainant did not direct the secretary of the interior to make any order withdrawing the lands that might fall within it from sales, pre-emption, homestead entry, or other disposition, and did not prescribe the effect to be given to such an order. It is not for the court to say whether the secretary ought or ought not to have allowed the homestead entry while the general order of withdrawal remained unrevoked. It is sufficient for the purposes of this suit to say that in doing so he did not interfere with any legal right of complainant, for the simple reason that complainant had not then acquired any right to the land in controversy in the only mode it could acquire it, namely by selecting it."

In the Guilford-Miller case the final decision was not made in favor of the settler, and against the railroad company, until after the order of withdrawal had been revoked. This as now seen was also the fact in the Hewitt case. Secretary Vilas, speaking of this aspect of the Miller case, says:

"Meantime, whatever may have been the validity of the order of withdrawal, it was revoked on the 15th of August last. If I were bound to

regard Miller's homestead entry as irregular, because in conflict with the subsisting withdrawal at the time it was made, yet, inasmuch as that withdrawal has entirely ceased, and no objection remains in any right of the company, or otherwise, so far as known to the Department, to his taking this land, and, inasmuch as his settlement and long residence (assuming his claims in respect thereto will be established by final proofs) entitle him to equitable consideration, it would appear to be not an improper exercise of discretion to now direct the allowance of his application for a homestead entry."

That Congress recognizes and approves, in the disposal of public lands to actual settlers, the application of such equitable consideration, is apparent in section 2450 of the Revised Statutes, which is as follows:

"The Commissioner of the General Land Office is authorized to decide upon principles of equity and justice, as recognized in courts of equity, and in accordance with regulations to be settled by the Secretary of the Interior, the Attorney General, and the Commissioner, conjointly, consistently with such principles, all cases of suspended entries of public lands and of suspended pre-emption land-claims, and to adjudge in what cases patents shall issue upon the same."

The Secretary, Attorney-General, and Commissioner made a series of rules to carry this act into effect. The 8th, 13th, and 19th provide for perfecting and patenting pre-emption entries as follows:

8. "Pre-emption entries allowed under one

pre-emption law, where it shall have been discovered that said entries are invalid under that act, but where the settlement and improvement is of a character to have entitled the parties to a legal and valid claim under a subsequent law, provided the land is not embraced by the valid claim of another."

13. "All bona fide entries on lands which had been once offered, but afterwards temporarily withdrawn from market, and then released from reservation, where such lands are not rightfully claimed by others."

19. "All entries made upon land appropriated by entry or selection, but which entry or selection was subsequently cancelled for illegality."

It would seem that the statute, and the regulations made under it, would well warrant the Secretary (Vilas) in the declaration that a settler's claim made inside a reservation could properly be perfected into a patent, after the reserve was cancelled, without forcing the claimant to go back and repeat all the preliminary steps which ordinarily precede a patent. Such equitable considerations would appear to be peculiarly strong in the case of Hewitt. He went on the land in good faith and put valuable improvements on it, filed the required declaratory statement and was given the ordinary receipt therefor. So far as disclosed by the record he had no notice of the alleged withdrawal until he came to make his final proof and pay for the premises. He prosecuted his claim to the best

of his ability and was still prosecuting it when the order revoking the alleged withdrawal was made.

V.

That the Railroad Company never made a valid selection of the tract, the alleged selection was void, and the company has not now and never did have any title.

The bulk selections, made by the Company March 19, 1883, was under a rule, *then existing*, that the Company must file with such list of selections a list of losses—"tract for tract."

This rule was modified—not abrogated— by the Teller circular of May 28, 1883,—70 days later.

But the Teller circular did not contemplate or provide for approving lists of selections until the matter of losses, upon which such selections were supposed to be based, had been fully investigated. If it had so provided, it would have been in derogation of the clear meaning and intention of the law. The Company could not initiate a selection, which would be a basis of any right, until it was duly ascertained that "some section or part of section" of equal area

had been lost to it by sale or otherwise in the granted limits. And before any right in any odd numbered section in the indemnity limits could attach in the Company, the fact that a similar loss had been sustained in the grant, ***must be ascertained under the direction of the Secretary***. Hence the Teller circular simply undertook to relieve the Company from gathering and listing losses which might be bases of its selections, and imposed the task upon the land officers. This is not an abrogation of the legal requirement that losses must precede selections "tract for tract". Such a ***selection***, and such only, is that contemplated by the law. The alleged selection of March 19, 1883, was merely a list made in bulk of all the odd numbered sections in the indemnity limits of that land district? Such a list made up and filed with the Register and Receiver was no selection whatever within either the provisions of the law—or the regulations. Neither was it a selection contemplated by the Teller circular. The language of this circular is:

"The Commissioner of the General Land Office.—Sir: It is my desire to open for setlement as speedily as possible all the lands within the indemnity limits of the grant to the Northern Pacific Railroad Company not actually required to supply the lands lost in place within the granted limits.

The grant should be adjusted at the earliest possible time, that the orders of withdrawal may be vacated without unreasonable delay as indicated in my letter of the 17th inst. The unparalelled demand for lands for actual settlement

by great numbers of persons, not only from foreign countries, but from the older states, seeking homes, under the settlement laws, along the line and within the vicinity of the Northern Pacific grant, requires for the best interest of the country and all parties concerned, that the withdrawal should not be maintained any longer than is actually necessary for the adjustment of the guaranteed right of the company.

In order to facilitate the work of making selections, I think you should instruct the local officers that, when clear lists of selections free from conflicts or other objections are filed with the district officers and approved by them, said selection should at once be marked on their books and forward for final examination, leaving the ascertainment of the lands lost in place to your office, instead of requiring preliminary lists of such lost lands together with the indemnity lands, 'tract for tract' from the company as heretofore.

I am satisfied that the work of adjusting the grant will go forward much more rapidly under this plan than under the former practice.

Very respectfully,

H. M. TELLER,

Secretary.

It is seen that the Secretary here uses the word "selections" in two distinct senses. In the phrase—"in order to facilitate the work of making selections, I think you should instruct", etc,, he clearly uses the word in the sense of embracing everything necessary to be done to pass the title to the company,—namely, the ascertaining of the losses in place, the listing of the corresponding tracts in the odd sections within the indemnity limits, and then determining that the

losses have actually occured and the listed indemnity lands are free from claims and correspond in acreage, and finally the approval of these by the Secretary.

But in the phrase "when clear lists of selections, free from conflict or other objection, are filed with the district officers and approved by them, said selections should at once be marked upon their books and forwarded for final examination," etc., the word is used in the sense of designating the tracts of lands sought to be acquired by the grantee. "Clear lists of selections" can mean nothing other than lists of tracts clear from claims. Again "said *selections* should at once be marked upon their books", means that the *listed tracts* should be so marked. It is gramatically and logically impossible that the word in the latter phrase should be synonymous with "selections" as contemplated in the law. The act says "other lands shall be selected by said company in lieu thereof under the direction of the Secretary of the Interior." This kind of selection requires the offices of both the Company and the Secretary. Until both have done their duty in that regard, there is no legal selection, and hence no rights have attached. And as we have seen in the decision of *Wisconsin Central Railroad vs Price Co.—supra,* it is no perfunctory duty that is imposed upon the Secretary in this regard. His required action is judicial. He must determine whether there were deficiencies in the grant, and whether the land selected by the company to meet such deficiency could be

properly taken. Hence, his approval "was essential to the efficacy of the selections, *and to give to the Company any title to the lands selected.*"

In the light of the foregoing. the so-called selections of March 19, 1883, were not selections at all. Tney were merely listing of odd sections in the indemnity limits without regard to whether they were already covered with legal claims, and without designating any losses. And this list was filed, and the certificate of the Register and Receiver secured thereto, in direct violation of the existing requirement of the Department. That the Department did require the Company, *at that time*, in order to initiate the proceeding of making selections under Section 3 of the grant, to file with the Register and Receiver preliminary lists of lands, lost in place together with the indemnity lands, tract for tract, is clearly evident by the Teller circular. As before stated, that circular is dated May 28, 1883, while the so-called bulk-selection was filed in the local land office March 19, 1883. In the last clause but one, the Commissioner of the General Land Office is directed to instruct the local officers that when clear lists of selections (tracts) are filed with them, such selections (tracts) shall be marked upon their books and forwarded to the Land Department for final examination "leaving the ascertainment of the lands lost in place in your (the Commissioner's) office, instead of requiring preliminary lists of such lost lands, together with the indemnity lands, tract for tract *from the company as heretofore.*

It would seem that this conclusively proves that at the time the "bulk list" was filed and up to May 28, 1883, the company was required to couple with its list of proposed selections a list of equivalent losses, "tract for tract." And there is no attempt in the Teller circular to make its provisions retroactive. It does not relieve the local officers and the railroad company from the former requirements at any time preceding its date. Its language can only be construed as affecting the future acts of the parties named. If the company desired to take advantage of its terms it must file its lists at some date subsequent to the issue of the circular.

Defendants cite *St. Paul etc. R. R. Co. vs N. P. R. R. Co., 139 U. S. I, 19* as establishing the rule that if the total area of the lands in the indemnity limits are insufficient to satisfy the losses from the place limits the indemnity lands are appropriated without selection.

In the first place it does not appear by the record that the Company is entitled to all the indemnity lands, and furthermore the rule is not as contended.

The case cited was a contest between two *railroad companies* and the court determined that where the deficiency within the granted limits is so great that all the indemnity lands will not make good the loss, no formal selection was necessary to give them to the company having the older grant, *as against the other company.*

The case is distinguished in *U. vs Missouri etc. Railway, 141 U. S. 358, 376,* and held to have no application in a contest between an individual and a company claiming the land for indemnity purposes.

This distinction is also noted in *U. S. vs Cotton, Marble and Lime Co. 146 U. S, 615, 616,*

Nothing appears in the record bearing upon the question of the area of losses in the granted limits except the certificate dated May 2d, 1896, embraced in Finding VIII Rec. p. 53.

The certificate in question is not entitled to any weight as evidence, but if it were, it would not show that the company is entitled to all the indemnity lands to make good its losses in the primary limits. It does not purport to cover *all* the indemnity lands but only the "first indemnity limits," the second indemnity provided by the act of May 31, 1870, not being embraced in the certificate. It therefore does not appear that the company is entitled to all the indemnity lands even if that were in any way material.

Furthermore it has been held by the Department that there has been no official designation of the deficiency of the grant to the Company.

"The Northern Pacific is not entitled to invoke the protection of the order of May 28, 1883, waiving specification of loss, where it assigns an insufficient basis for a selection in the presence of a contest involving the right to enter the selected tract; nor can a subsequent assignment of

a sufficient basis avail the company as against the right of the contestant in such a case.

There has been no Departmental recognition of an ascertained deficiency in the Northern Pacific Grant; nor has the company been relieved, on account of such deficiency, from the specification of losses in making indemnity selections."

N. P. R. R Co. v. Strieb, 26 L. D. 589.

The company never acquired any right to the land as has been conclusively demonstrated. Defendants as the immediate grantees of the Company have no greater rights to the land than the Company, its grantor, had.

Plaintiff's patent when issued related back to the date of his entry November 2, 1882, upon which it was based, and the alleged selection of the Company having been made on March 19, 1883, plaintiff's rights under his patent are prior the initiation of all rights claimed by the Company on account of that alleged selection.

Defendants, therefore, are not in privity with the United States and cannot successfully attack plaintiff's patent, either at law or in equity. They cannot be heard to say the patent is void.

Defendants not having any rights to the land, plaintiff's patent is in any event good as against their attack. It is purely a question between the Government and Hewitt.

So if it should be determined that both plaintiff and defendant have no rights to the land in question the patent itself would still be good as

against defendants, and plaintiff must prevail in the action.

New Dunderberg Min. Co., v Old (C. C. A.) 79 Fed, 598, 606.

Dewese v Reinhard, 19 U, S. App. 698, 706. 10 C. C.A. 55; 59, 60 and 61 Fed. 777, 781;

In Hartman v Warren, 40 U. S. App. 245, 22 C. C. A, 30 and 76 Fed. 157, 163, the court says;

"In every other case cited by counsel for appellant, the equitable right to the land which prevailed over the legal title had been initiated by settlement upon or improvement of the land before the foundation of the claim which went to patent was laid. Under the preemption laws, settlement and improvement by a qualified preemptor gives him a right to be preferred in the purchase or other acquisition of the land, where the United States had determined to sell or dispose of it. *Sheply v. Cowan 91 U. S. 330.* In every case cited by counsel for appellant in which the equitable right to the land prevailed over the legal title the former had either been recognized by the United States by a grant or an entry of the land, or by the acceptance of payment for it, so that the equitable owner was in privity with the government, or the equitable right had been initiated before the claim which went to patent by a settlement or an improvement of the land under a law which gave to the settler or improver a right to be preferred in its acquisition. No authority has been cited which holds that one who is not in privity with the government, and who has never acquired any right to the land until after it was entered by the patentee, can maintain a bill to divest him of the legal title."

The case cited on behalf of defendants on page 36 of their brief relate to the determination of the priority of the rights of the parties, and simply reaffirms the well established rule that the land should be awarded to the party who has initiated the *prior* right thereto. There both parties have initiated rights or equities in the land in controversy. In the case at bar the company, defendant's grantor, has never initiated any rights whatsoever to the land.

On the other hand, in *Smelting Co. v. Kemp, 104 U. S. 630, 647,* Mr. Justice Field in delivering the opinion of the Supreme Court to the effect that a patent could not be successfully impeached either in an action at law, or a suit in equity unless the attacking party is in privity with the government said of the complainant:

"He must resort to a court of equity for relief, and even there his complaint cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the patentees hands. *Roggs V. Mining Co., 14 Cal. 179, 353.* It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it. If the government is dissatisfied, it can, on its own account, authorize proceedings to vacate the patent or limit its operation."

For these reasons the judgment of the Su-

preme Court of North Dakota should be reversed and that of the District Court affirmed.

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JAMES H. McKENNEY,
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No. 34, 48 & 49.

Add'l Brf. of Mr. McGowan, Counsel

Supreme Court of the United States.

Patrick for P.

OCTOBER TERM, 1900.

Filed Oct. 23, 1900.

FRED. HEWITT, PLAINTIFF IN ERROR,
v.
EMIL SCHULTZ, ET AL. } *No.* 34.

J. M. MOORE, PLAINTIFF IN ERROR,
v.
D. B. STONE, ET AL. } *No.* 48.

J. M. MOORE, PLAINTIFF IN ERROR,
v.
JOHN CARMODE. } *No.* 49.

Additional Brief of Plaintiff in Error in No. 34, and of Defendant in Error in No. 48 and 49, in Answer to Supplemental and Reply Briefs Filed by Counsel Representing the Northern Pacific Railroad Company's Grantees Subsequent to the Call of these Cases for Argument.

J. H. McGOWAN,
GEORGE TURNER,
GEO. H. PATRICK,
Of Counsel.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
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IN THE

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JOHN CARMODE.

Additional Brief of Plaintiff in Error in No. 34, and of Defendant in Error in No. 48 and No. 49, in answer to supplemental and reply briefs filed by counsel representing the Northern Pacific Railroad Company's grantees subsequent to the call of these cases for argument.

BRIEFS IN ALL CASES.

We submit, and the Court is requested to consider, the briefs and arguments for the settlers, and the opinions

and special proofs appearing in the records in cases No. 34, No. 47, No. 48, and No. 49, which were argued together as one case, as applying to all the cases alike. Effort has been made to avoid duplicating the arguments of one case in the others.

The Court is further requested to read the decisions of the Department of the Interior in—

Aug. 13, 1887. Atlantic & Pacific R.R. Co., 6 L. D., 85–93;
Aug. 2, 1888. N. P. R.R. Co. *v.* Miller, 7 L. D., 100–126;
(Covering 80 cases, none of which have been appealed or reviewed, while numberless cases have followed this decision in the 12 years past);
Sept. 3, 1891. N. P. R.R. Co. *v.* Walters, 13 L. D., 230–236;
June 2, 1892. N. P. R.R. Co. *v.* Pettit, 14 L. D., 591–592;
(Showing that St. Paul and Pacific R.R. Co. *v.* N. P. R.R. Co.—139 U. S. 1—is not authority, upon state of facts found in records herein, that selections are not necessary in indemnity limits);
July 7, 1893. Cole *v.* N. P. R.R. Co. 17 L. D., 8–19;
Oct. 14, 1893. LaBar *v.* N. P. R.R. Co. 17 L. D., 406–410;
July 25, 1894. N. P. R.R. Co. *v.* Davis, 19 L. D., 87–91;
Oct. 4, 1894. N. P. R.R. Co. *v.* Benz, 19 L. D., 229–231;
Dec. 20, 1897. N. P. R.R. Co. 25 L. D., 511–514;
April 29, 1898. N. P. R.R. Co. *v.* Streib, 26 L. D., 589–591;
Digest of Land Decisions, Dept. Interior (1897);
"Withdrawal," pp. 477–489;
"Indemnity," pp. 489–492;
"Selection," pp. 492–504;

not as authorities, but as full and exhaustive arguments, which we make our own, of the questions involved in all these cases; the reasons for the Department's uniform

rulings for the past 12 years, that, unless clearly wrong, should be decisive after thousands of vested rights have accrued to settlers thereunder.

THE BAR OF THE STATUTE OF LIMITATIONS.

Counsel have misapprehended our application of the statute of limitations of ten years. We were aware of the contention that the statute is suspended during contest in the Land Department, and this was particularly suggested in the oral argument, but it is without force. It is open for this Court to determine whether a contestant may hold up a pre-emption entry for 12 years by an ineffectual contest, and then, upon the facts appearing in these records, the same facts urged and *decided* in the contest, be aided by a court of equity to avoid the consequence of his own laches, the bar against a suit at law. The trouble is that the record, in the matter of title or right in the railroad company, blows hot and cold. Plaintiff wants to secure the benefits of the rights for which action is barred, so far as relates to relief, but for jurisdictional purpose, to avoid the bar by asserting these rights in an action also for entirely different relief that would be of little value unless it included that which he no longer has any legal right to demand. This can be done no more in equity than at law. In the complaint, at p. 8, Record No. 49, appears the following:

> "The plaintiff alleges that by virtue of the premises and *upon the definite location* of the line of said railroad, the said Northern Pacific Railroad Company became *the owner in fee simple* of the northeast quarter of section three, in township thirteen, north of range forty-two east, Willamette meridian, in Garfield county, in the then Territory (now State) of Washington." (The land in controversy.)

The material dates in this connection are :

Feb. 7, 1898, complaint filed (p. 14, Record No. 49).

Oct. 4, 1880, first definite location of line of road (p. 8, Record No. 49).

Oct. 4, 1880, withdrawal of lands in place and indemnity limits.

"Prior to 1885," final definite location (p. 7, Record No. 49).

(If the Act of July 2, 1864, does not prohibit withdrawal of indemnity lands, as we contend—at least it does not direct it, and authority for the executive withdrawal must be found elsewhere.)

Aug. 15, 1887, the executive withdrawal as to indemnity land was revoked by the same authority. (6 L. D. 92–93.)

No other withdrawal of indemnity lands has been made therefor, and the revocation having been within the power of the executive, whether because the withdrawal had been invalid or improvident, in contemplation of law, no withdrawal ever has been made. The right of the executive to revoke the withdrawal is unquestioned by any court and has uniformly been recognized by the Department.

In 1883, in Dakota, and

Jan. 5, 1884, in Washington, was the first alleged selection (p. 8, Record No. 49), in bulk, which we style an office listing without actual selection, and which was abandoned by the later selection of October 26, 1887, therefore a fatal gap in the railroad company's chain of title; but this never was approved, therefore void. (P. 2, Bunn & Kerr, Reply Brief.)

Oct. 26. 1887, in 48 and 49.

In 1892, in No. 34, the company made an alleged tract for tract selection that, also, never was approved. (P. 9, Record, No. 49.)

Apr. 10, 1882, settlement in No. 34.

Nov. 2, 1882, pre-emption filing.

Apr. 4, 1883, final proof.
June 22, 1895, patent issued.
In March or April, 1882, settlement in No. 48.
July, 1890, pre-emption filing.
May 2, 1898, patent issued.
Apr. 25, 1882, settlement in No. 49.
Jan. 5, 1884, pre-emption filing.
In 1897, patent issued.

(No patent or other record title was ever issued by the Government to the R.R. Co. which claims that the Act of July 2, 1864, granted fee simple title thereto, dating from definite location of 1884 or 1887—which?)

We must take the record as we find it; so, the complaint in 48 and 49 averring fee simple title, counting from the latest and most advantageous date for the R.R. Co., the statute interposes to bar suit, unless saved by the pendency of the Land Office contest.

Suit for possession, ordinarily ejectment, is an ample remedy when one party has title warranting possession and the other only adverse possession under none or some inferior title. Practically, whatever the legal fiction, suit for possession settles the dispute over title. One having the complete fee simple and equitable title must necessarily have right of possession superior to any other claimant. One having an adequate remedy at law may not resort to equity. That is this case, so far as the controversy over the land and between the parties. Something more might be necessary to obtain a construction, especially an overturning of the Guilford Miller decision. The R.R. Co., which neglected to bring that case, or the 80 other cases settled by it, into the courts within ten years after its promulgation, August 2, 1888, could well afford to lose these four cases on the merits if thereby the Miller precedent could be modified; but these four

settlers care nothing about ancient history; they only desire to save their own homes under the facts in their respective cases and the law applicable thereto.

Further along in the complaint, following the averment of selection, although even the words "*duly* selected," or their equivalent are omitted (and the ascertainment of a deficiency, and the due selection and approval within indemnity limits are absolute prerequisites to either title or claim by virtue of selection in lieu of deficiency), appears

> "That by reason of the facts *hereinbefore* set forth, the said Northern Pacific Railroad Company became the owner in fee and entitled to the immediate and exclusive *possession* of said lands and the whole and every part thereof, and was the owner of the complete equitable title therein and thereto." (P. 9, Record, No. 49.)

And the date fixed for the inception of this last above title was October 26, 1887 (same paragraph of complaint), ten years *and three months* prior to filing of suit.

Therefore, if *fee simple title* passed by and with the definite location of October 2, 1880, or "prior to 1885," or by the selection of October 26, 1887 (even were the later selection not of itself an abandonment of the earlier selection which did not pretend compliance with departmental requirements), the above averments at page 9, Record No. 49, dating plaintiff's right or claim herein only from October 26, 1887, must be taken as a formal abandonment of all earlier claim. The settler's rights and title accrued before the last named date.

Plaintiff cannot take advantage of his own wrong, and by his own act in instituting and prolonging the contest of the entry for twelve years, suspend the running of the statute. Whoever resorts to equity must have clean

hands and do equity. Whoever asks equity to enforce a legal right must (ordinarily) have exhausted all remedies at law. A man may not let the statute bar an action at law, and then, because of some additional strengthening of the title of the party in possession, say by the acquiring of a new title, at a day within the statute, do indirectly what he could not do directly, and try the old title or oust possession under it. This suit is for *possession* of the land, without which recovery would be valueless. It is a combined action at law and in equity permitted by the Washington code practice, and will be treated here as an equitable proceeding. As the R.R. Co.'s grantee has to-day no right or title not existing to the fullest extent on October 26, 1887, at latest, he had the same right of action then that he had February 7, 1898, when barred by the ten year statute unless the running of the statute was suspended by something not yet suggested in record or argument, *for nothing occurred between those dates.* Suit to vacate a patent could not be filed until after the issue of the patent, of course, and that argument would apply to a considerable portion of this controversy, the relief prayed for herein ; but this suit, stripped of all legal disguise is for *possession ;* and if plaintiff is entitled to possession now so he was entitled October 26, 1887, more than ten years before suit. Because this suit could affect rights within ten years, is no reason why it may go behind the statute and decide issues barred from consideration by any court, the vital issues, too, so far as the settler and his adversary claimant are concerned.

It is well settled that a homestead entry will support ejectment. This being so, necessarily a better title or right so superior that it would oust an entryman's possession would support some form of action for possession, as the form of action herein, which has been brought

upon the state of facts that existed prior to October 26, 1887. In these cases, the plaintiff asserts such superior right or title.

True, it is a little difficult to locate the precise prior right claimed or where our adversary finds it, but it is that or nothing. Unless he has such superior right his action fails upon the merits. If he has such right, action therefor was barred before suit. He declares that he had such right more than ten years before suit, and he must stand or fall by his declaration. No other judgment can be rendered upon the demurrer.

At page 3 of the reply brief, filed October 16, 1900, plaintiff quotes an isolated and an abstract extract from Marquez *v.* Frisbie (101 U. S., 473–5), as authority for

> "It follows, therefore, that the suits before the court could not have been commenced while the matters involved were still *in fieri*, before the Land Department, and that, therefore, the statute of limitations could not begin to run until title passed out of the United States."

The whole opinion, so far as applicable, seems to support just the opposite view.

This was an action brought by a pre-emption settler *in possession* against the railroad company and its grantee who had secured a decision, *not then final*, in their favor and against this settler, in the Land Department, "praying a decree of the court declaring him to be its true owner, and his right to the title paramount," and there was a prayer, as in the case at bar, that defendants should be declared to hold the land in trust for plaintiff, and be compelled to convey the same accordingly, etc., etc. The court, Mr. Justice Miller rendering the opinion, held that this must refer to the legal title (plaintiff, the settler, be-

ing in possession), which defendants had not, and which had not passed out of the United States, while the whole matter of such *title* was still undetermined before the land officers.

The court qualifies the quotation in our adversaries brief, by saying:

> "*We did not deny the right of the courts to deal with the* POSSESSION *of the land, prior to the issue of the patent, or to enforce contracts between the parties concerning the land.* But it is impossible thus to transfer *a title* which is yet in the United States."
>
> "If, however, we could suppose that defendants had obtained the patent which the Secretary has decided they are entitled to, that patent and the order on which it issued has in its favor all the presumptions which such an instrument necessarily carries, to which is to be added in this case the plaintiff's allegation that it was founded on a decision made after full contest and repeated hearings, by appeal and otherwise, by the officers to whom the law has specially confided the adjudication of that class of cases.
>
> "The rule which governs the courts in the effort to correct any error in such decision has been so repeatedly stated here as to leave no room for doubt or misconstruction.
>
> "That principal is that 'the decision of the officers of the Land Department, made within the scope of their authority, on questions of this kind, are in general conclusive everywhere, except where considered by way of appeal within that department; and that, as to the *facts* on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice, when the title afterwards comes in question."

Then follows the quotation at page 2 plaintiff's reply brief, which also is qualified by the succeeding paragraph of the opinion:

> "The language of this court in Moore *v.* Robbins cited above is that equity will interfere 'when it is *clear* that these officers have by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another.'
>
> "The meaning of this, and the sound principle, is that when it is a mixed question of law and of fact, and when the court cannot so separate them as to see *clearly* where the mistake of law is, the decision of the tribunal to which the law has confided the matter is conclusive."

No one can take the record, of which the Land Decisions and Reports must be considered part—for they are public records that courts will notice—and say that the first indemnity limits are insufficient to fully satisfy any deficiency either existing or ascertained to exist in place limits. Whatever may be the fact, it is certain that no one *knows* that they are insufficient, and the entire record which contains no averment that any deficiency has been *ascertained* seems to establish that the real deficiency is very small and not nearly the area of vacant and unappropriated lands in the indemnity limits. The R.R. Co. seems to fear an ascertainment of the exact deficiency, while the land department denies that any insufficiency has been ascertained or exists. Is this not a decidedly mixed question of law and fact?

In Marquez *v.* Frisbie, as in these cases, the sufficiency of the pleadings was attacked, and the court concluded:

> "We are hardly inclined to believe that if everything so stated is to be treated as absolute verity that it makes out his right. But it is sufficient to say that plaintiff also shows that all his proofs, together with 'those on the other side which he has *not* set out in his petition, were submitted to and passed upon by the land officers, from the register and re-

> ceiver up to the Secretary of the Interior, and they decided against the validity of his claim."

And the patent was sustained for want of such mistake of law or fraud as would "justify the interference of a court of equity."

Marquez *v.* Frisbie declares that the court had *not* decided that suit for *possession* could not be brought during the pendency of proceedings in the Land Department in such positive terms as to make it an authority for such suit, were authority wanting.

Encumbering the record with a multitude of allegations and prayers about matters pertaining to suits to quiet title, etc., cannot distract attention from the real issue.

In paragraph XIII, p. 8, Record No. 49—

> It is recited that the N. P. R.R. Co., "became the owner in fee simple of the lands."

In paragraph XIV, p. 9, Record No. 49, appears—

> "That the N. P. R.R. Co. became the owner in fee and entitled to the immediate and exclusive *possession* of said lands and the whole and every part thereof." Similar averments are in the other cases.

The conclusion of the prayer for relief (XXI, p. 13, Record No. 49) is—

> "That plaintiff be adjudged entitled to the immediate and exclusive *possession* of said premises and the whole and every part thereof, *and be put in possession thereof by order of this court.*"

That is the meat in this suit—"*possession*"—and however we may lay aside the matter of legal title, some one was entitled to possession from April, 1882, when the settlement was initiated. The Government was not entitled, and

has so decided in the contest of this entry, which according to Marquez *v.* Frisbie, is conclusive. No legal objection having existed to a suit by the railroad company, or its grantee, they are barred by the statute unless they sued in time. It cannot be denied that every one concerned knew of the settler's adverse, open, and notorious possession in ample time, for the contest record shows this, and the company's grantee bought with full notice of the pending contest and prior settlement and possession, therefore stands in the railroad company's shoes. The record forestalls every excuse that might be offered for delay in suing the settler.

There has not been the gap of one day since April, 1882, in which the settler has not been in possession of the lands in controversy in Nos. 48 and 49 (he was ousted in No. 34), through settlement, cultivation, occupation, formal entry, final proof and patent. It has been his *home* for 18 years. He held under title or color of title. His was "a claim or right." Whoever had any better right to possession, and to whom the courts were open, has lost his right to sue for such possession by intervention of the statute that, in the interest of repose, conveys title even to a trespasser.

Presumably, the railroad company, if it had rights, was in constructive possession before 1882, but if so (the record is silent) was ousted.

From whatever date the company's "right" is considered, such right has not been continuous. A gap has occurred during which the settler's right could have attached, *and did attach*, more than ten years before the filing of suit.

N. P. R.R. Co. *v.* Colburn, 164 U. S. 385;
St. Paul & Pac. R. Co. *v.* N. P. R. Co., 139 U. S. 1;
Deseret Salt Co. *v.* Tarpey, 14 : U. S. 241;
2 Ballinger's Code (Wash.), secs. 4797–4907.

SELECTION AND APPROVAL NECESSARY IN INDEMNITY LIMITS.

But the effort to avoid the statute of limitations has forced our adversaries to an admission of our uttermost contention respecting selection.

At page 2 of their reply brief, filed October 16, it is said:

> "The law was settled in the decision in Wisconsin Central Railroad Company *v.* Price County (133 U. S. 496), that *the title to indemnity lands does not pass until the approval of the selection by the Secretary of the Interior.* But it does not follow that a prior right cannot be initiated by selection which will be protected and enforced against one who receives a patent upon an entry subsequently initiated. This court enforced such a right in St. Paul and Sioux City R.R. Co. *v.* Winona and St. Peter R.R. Co. (112 U. S. 720), and St. Paul and Pacific R.R. Co. *v.* N. P. R.R. Co. 139 U. S. 1)."

That leaves in the cases only grantees' "prior right that might have been initiated by selection."

The full meaning of that expression is a little obscure, so long have we associated the "initiative" with the first move; the beginning; the start; the introductory step (see Standard Dictionary), but unless it means that a selection, like a homestead entry that relates back to the original settlement, may be referred to something in the case antedating the 1882 settlements, it is an abstract axiom. There is nothing in these cases of date earlier than the settlements except the grant, two or three general route locations, the first definite location of the line of road which was in lieu, therefore an abandonment, of the general route location, and itself abandoned by the *final* definite location, and the withdrawal that was afterwards revoked as from the beginning. All the homestead filings, with one exception, antedated selections.

Were the contention true that the alleged withdrawal had the effect to create a condition during which no valid pre-emption settlement in the indemnity limits could be made, nevertheless that would not better the railroad company's "right or title." The withdrawal keeps off unauthorized persons until the railroad company can *duly* select, but creates or declares no right or title in the company; while a withdrawal that has been revoked is a nullity.

It is clear that the grant creates rights only within the place limits, with an equitable promise to supply *ascertained* deficiencies out of the indemnity limits after their *approved* selection, in the meantime authorizing homestead settlements. Therefore,

(1). The granting act created no "prior right" in the indemnity lands.

(2). The withdrawal could not create such "prior right," and, having been revoked so that it was as if never made, it did not interfere with settlement.

(3). The selection was not made until after the settlement rights had been fully fixed, rights that ripened into patent, and was not approved even then; so, in law, there never has been a selection.

The rule in Wisconsin Central Railroad Company *v.* Price County (133 U. S. 496), is not, in terms, overruled or questioned in St. Paul and Pacific Railroad Company *v.* Northern Pacific Railroad Company (139 U. S. 1), a suit between two railroad companies to determine conflicting or overlapping grants, in which was involved no settlers' rights; and the case of the Northern Pacific Railroad Company *v.* Sanders (166 U. S. 620), follows the Wisconsin Central Railroad Company *v.* Price County case (*supra*), while U. S. *v.* Mo., Kan. & Tex. R.R. Co. (141 U. S. 376), fully discussed in 14 L. D. 591-2, de-

clares specifically that St. Paul and Pacific R.R. Co. *v.* N. P. R.R. Co. (*supra*), is an *exception* to the rule and inapplicable to the case at bar.

Failing to show any "prior right" by grant, withdrawal, or selection, which clearly and indisputably is this record, the admission above quoted is the end of the controversy. There has been no withdrawal or selection, and the grant does not execute itself in indemnity limits.

THE INTENDED AREA OF THE WHOLE GRANT, OR GRANTS.

A query arose during the argument respecting the length and breadth of the tract within which lands of the primary and first and second indemnity locations were to be found. This was stated by counsel for the settlers in round numbers as 2,000 miles long by 120 miles wide, while our adversaries were of opinion that 1,800 miles better expressed the length. The distance from St. Paul to Tacoma is 1,909 miles (World Almanac, 1900), but, according to Henry Clews Investment Guide (1899), the length of the Northern Pacific Railroad Company is—

Main line.....	2,346.98 miles.
Branch lines.....	2,033.20 miles.
Making a total of.....	4,349.98 miles

of road, for which were appropriated, excepting a short distance across Minnesota, if we are to be guided only by the Act of July 2, 1864, or the Resolution of May 31, 1870, the odd sections in a strip 60 miles on either side of the road, that is, 120 miles wide, if necessary, equivalent to a solid body of land over 4,000 miles long and 40 miles wide (say 114,000,000 acres), or an area nearly equal to the original thirteen colonies. Our adversaries claim a solid body of land, or its equiva-

lent, 40 miles wide along the line of the road for its entire length, whatever that may be, deducting the amount within organized states wherein the width is but 20 miles. Perhaps the generally understood area of the grant is not over half or one-third the above estimate; even then immense, but, computing only from the statute—and our adversaries "demand the strict letter of the bond"—these figures are substantially correct, and the exact area of either place or indemnity limits has not been *ascertained*. If a discrepancy of fifty or sixty million acres between the statute and the fact exists as to the entire grant, and of the difference between some three million acres deficiency as stated in the complaint herein and not over 4,011 acres as stated with equal positiveness by the Land Department, it is manifest that the company's long delay in locating and building the road should not be permitted to create a deficiency that must have been ascertained before it can have legal status anywhere, nor support a suit based upon such deficiency until the deficiency shall have been ascertained in the only manner provided by law. The complaint lacks this averment.

The Department of the Interior denies the deficiency, and this department is sole judge of the fact. Whatever may be the true extent of the grant, it was so boundless that nearly eleven million acres are claimed to have been lost from it through the entries of predatory settlers; and it is no wonder that Secretary Lamar should have said in 6 L. D. 91, that—

> "A monopoly for an indefinite period of a vast part of the public domain (was) not contemplated by the grant."

Or that Secretary Vilas should have followed this in 7 L. D. 122, with—

> "The aim of this language was, as I am forced to read it, toward the availibility of all lands not granted.
>
> "It was a vast grant, and even as so limited, a threatening shadow on the settlements of the Northwest. Well might Congress say, 'the lands granted you shall have, but you shall tie up no more from the actual settler to the prevention of development.'"

The expression in the "reply brief" following the suggestion that "no hardship would result to the entryman through the loss of these suits," because he could relinquish his home and "move on," to some wild land, probably in Canada, for none appears nearer, according to the complaint, and that "the act of July 1, 1898, is sufficiently broad to afford substantial relief," is a delicately veiled bit of irony. The railroad company has carefully provided against doing equity, for it has not to relinquish lands it has sold. This explains the apparently reckless purchases of these disputed homestead entries encumbered with law suits. Sales have been made in *each* of the four cases at bar. If sales have as prudently been made throughout all the grant, and this is a far-seeing corporation, "it is (*not*) manifest that the provisions of the act are such as to allow the vast majority of settlers to retain their land."

Six feet of ground will sometime offer permanent relief to such of us as may not previously have been cremated or drowned, but we don't see quite how that could be pleaded in satisfaction of a settler's home whose present value is beyond any dollar-and-cents measurement.

To the criticism that—

> "The suggestion of counsel that a decision by this Court affirming the validity of the withdrawal orders, would have the effect of dispossessing a large number of settlers is without foundation,"

we beg to recur to the sales of *each tract* of land involved herein. *Every* settler before this Court would be dispossessed; and these are test cases. It is fair to assume that the others "are like unto the first."

Our adversaries first brief, at page 50, closes with the assertion that a selection was unnecessary. Their third brief commences, at page 2, with the positive assertion that—

> "The law was settled by the decision of this Court in Wisconsin Railroad Company *v.* Price County (133 U. S. 496), that the title to indemnity lands does not pass until the *approval* of the selection by the Secretary of the Interior."

The argument of the statute of limitations has borne unexpected fruit.

The bulk selections of 1883 and 1884 were abandoned when the company filed the second selection covering the tract in question in 1887.

This question is dealt with and decided by the Secretary of the Interior in La Bar *v.* Northern Pacific, 17 L. D. 406. Here the Department was dealing with a settlement claim on an odd section within the indemnity limits of the Northern Pacific in the Fargo land district. In referring to the so-called second list of selections filed by the company on October 12, 1887, the Secretary declares that this latter list contains 7,900.78 acres less than the list of 1883, and the losses are correspondingly reduced. He then proceeds as follows:

> "In this connection I will state that an examination of the two lists shows that different losses are substituted in the second list, and like the first list,

the losses are not arranged tract for tract with the selected lands. The question arises, then, what is the effect of the filing of this second list upon claims attaching prior to the filing of the same? It is plain that it was intended as a substitute or amendment of the old list, and on account of its variance therefrom must be treated as an abandonment of the old list, for the company cannot stand on two lists specifying different losses as a basis therefor. It may be urged that such variance is but slight—that is, that the losses are the same with the exception of a few thousand acres, but, as neither list is arranged tract for tract, it cannot be said to which tract the variance applies. When La Bar settled on October 1, 1887, he settled subject only to the selection of 1883, which, having been abandoned, removes any bar against his settlement. A point of time must elapse between the substitution of the lists, and La Bar being a settler, his right attached upon the instant, and bars subsequent selection on account of the grant."

If the 1883 and 1884 selections were abandoned in 1887, then it must be held that between the filings in 1883 and 1884 and the date of abandonment, the selections had no power to reserve the lands from settlement claims. When the second selection (1887) was made, the withdrawal of the indemnity limits had already been cancelled. The withdrawal and the bulk selections of 1883 and 1884, being thus out of the way, the settlement claims, all of which were made previous to the second selection, attached to the various tracts, the settlers being on the ground and asserting their claims when the second so-called selection was made.

Were the losses in the granted limits so great that the odd-numbered sections in the indemnity limits were insufficient to supply them?

In cases No. 48 and 49, such allegation is attempted to be made in the bill of complaint, and in case No. 34, the record contains in the stipulated facts on page 38 what purports to be a certificate by Commissioner Lamoreux stating in substance that in the granted limits there would be a deficiency of 3,559,222.78 acres which could not be satisfied from the *first* indemnity limits.

It is upon this pretended certificate that counsel for defendant, in case No. 34, base their claim, set up in the last clause of their brief, that no selection in the indemnity limits was necessary—the odd-numbered sections therein being appropriated to the R.R. Co., without such selection. To show that the certificate of the Commissioner found in the record of 34, is unreliable and of no importance, we call the attention of the court to Senate Document No. 150, 54th Congress, Second Session, in which the Commissioner of the Land Office reports the deficiency in the entire grant at 559,889.99 acres. And in N. P. R.R. Co., 25 L. D. 511, the Secretary declares that on November 5, 1897, the Commissioner reported the approximate deficiency in the entire grant at 530,573 acres. The so-called certificate of Commissioner Lamoreux is dated October 5, 1896. It elsewhere appears as May 2, 1896. The report to the Senate found in Document No. 150, was made Feb. 23, 1897. It thus appears that the Commissioner of the G. L. O. was making *guesses* only, but which had the semblance of being in good faith, as the deficiency was given to the fraction of an acre.

To show that these foregoing statements were the result of computation without any sufficient basis, it is enough to say that a large proportion of the lands lying within the granted limits have never yet been surveyed, and the same is true of a large proportion of the lands

within the indemnity limits. Hence there was no basis for stating the losses in the primary limits, nor the amount of land available for indemnity in the outer limits. This fact, that the surveys had not then and have not now been completed, is within the knowledge of the court, and was stated by counsel for the R.R. Co., in response to an inquiry from one of the justices during the oral argument.

On page 5 of the report of the Secretary of the Interior for the fiscal year ending June 30, 1899, the Secretary calls attention to the late report of the Commissioner of the General Land Office with regard to this Northern Pacific, grant, and states that such report "purports to give definite statements with respect to the status of the grant to the Northern Pacific, but the Commissioner's attention being called to many unsettled and litigated questions, in advance of the settlement and adjudication of which no definite statement of the status of the grant is possible, he has submitted a supplemental report which concludes as follows:

> "In conclusion, I have the honor to state that the portion of my report which relates to this subject was written for the purpose of giving information to the Department relative to the character and quantity of the work performed and the results accomplished during the fiscal year, and without any intention of making an authoritative statement as to whether or not the Northern Pacific grant by the Act of 1864 could be satisfied.
>
> "In view of the large quantities of unsurveyed lands within the grant, and of the uncertainty of their availability for use in the satisfaction of it; of the litigation pending involving lands within the conflicting limits aforesaid and the true eastern terminus of the grant, and considering the proceedings now in progress under the Act of July 1, 1898, and the right of selection for lands within the Mount Rainier forest

reserve under the Act of March 2, 1899, and the prospect of the creation of other forest reserves within the limits of the grant, *I am of opinion that it cannot at this time be stated with any degree of certainty that there are or are not sufficient lands available to satisfy the Northern Pacific grant under the act of* 1864."

In addition to all this, the Secretary found in N. P. R.R. Co., 25 L. D. 511 *et seq.* (*supra*), and in N. P. *v.* Streib, 26 L. D. 589, that there has never been any ascertained deficiency in the grant to the Northern Pacific showing that it could not be satisfied by obtaining the available lands in the indemnity limits. In 25 L. D. just cited, the Secretary sets out the conflicting statements made by the Commissioner concerning the matter of deficiency, and declines to make a decision to the effect that a deficiency has been established. And in 26 L. D. the Secretary says: "Relative to the certification of a deficiency in the grant to this company (the Northern Pacific) made by your predecessor, it is sufficient to say that this Department has never given recognition to that certificate, nor has the Company been relieved from the specification of losses in making indemnity selections on account of an ascertained deficiency in the grant."

SUMMARY.

The questions raised by the supplemental briefs filed by the R.R. Co., on behalf of its grantees in these various cases, may be stated as follows:

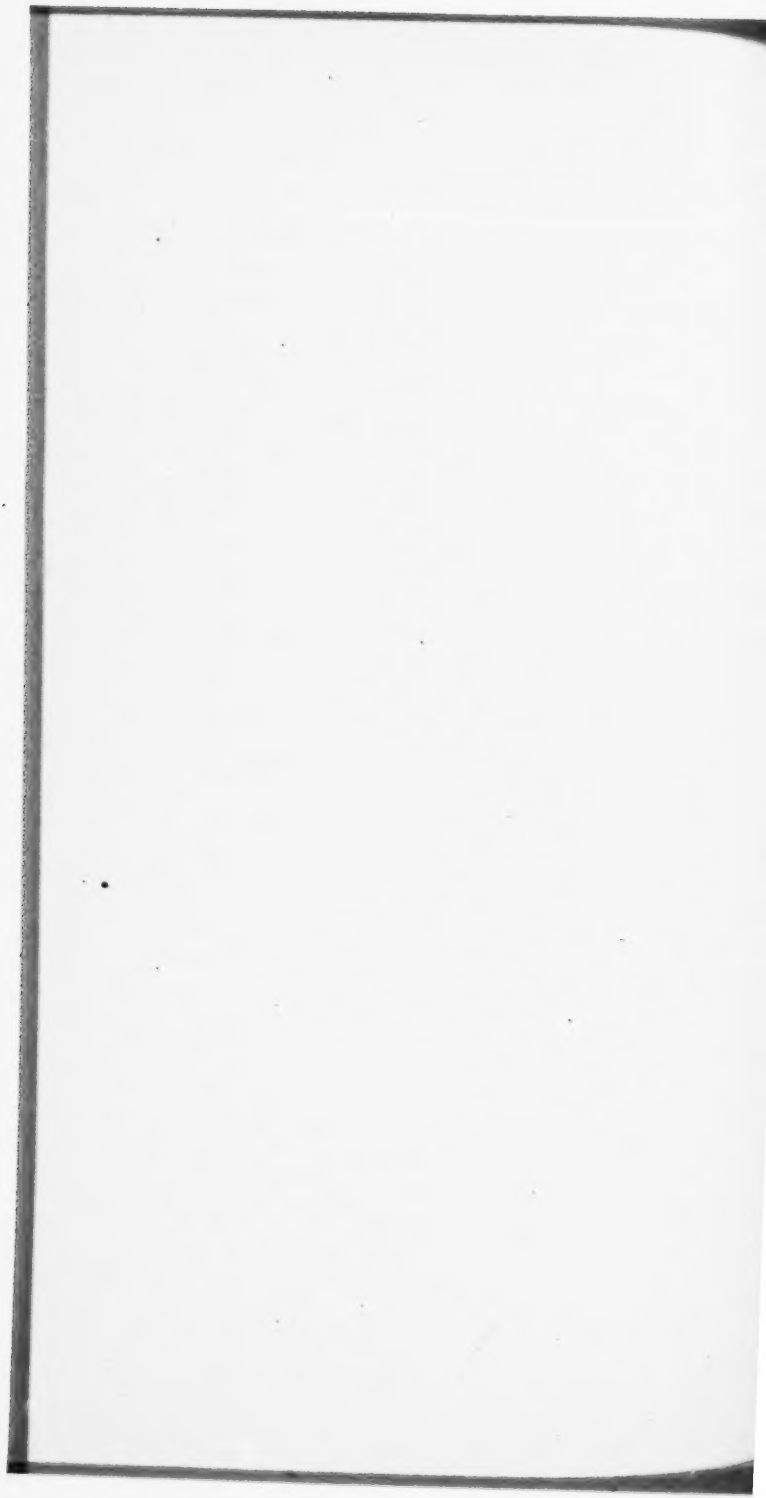
First. If the withdrawal of the indemnity limits was illegal, then the rights of the plaintiff in 34, and the defendants in 48 and 49, attached to the various tracts upon settlement, and were properly ripened into patents.

Second. If the so-called bulk selections of 1883 and

1884 were not such a compliance with the law and regulations as to selections, as to appropriate the lands for the benefit of the R.R. Co., and reserve them from settlement rights, then, and in that event, as soon as the withdrawal was revoked (Aug. 15, 1887) the settlers being upon the tracts improving them and claiming them in good faith, their rights immediately attached. All these settlers were on the lands *before* the 1883 and 1884 selections.

Third. If the withdrawal of 1873 should be held sufficient to bar the inception of settlement rights during its pendency, and if the so-called selection of 1883 was sufficient to reserve the lands from settlement claims after the withdrawal had been revoked, yet if the filing of the so-called selection in 1887 was, on the part of the R.R. Co., an abandonment of the previous selection, then, and in that event, the settlement claims were properly patented, as all the settlers were on their respective tracts previous to the said second selection.

J. H. McGOWAN,
Of Counsel for Plaintiff in Error in No. 34.
GEORGE TURNER,
GEO. H. PATRICK,
Of Counsel for Defendants in Error in Nos. 48 *and* 49.



No. 241 34

Br. of Bunn & Kerr for D. & E.

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OCTOBER TERM, 1899.

NUMBER 241.

FRED HEWITT,
Plaintiff in Error,

v.

EMIL SCHULTZ and FRIEDERIKA SCHULTZ,

ARGUMENT FOR DEFENDANTS IN ERROR.

C. W. BUNN and
JAMES B. KERR,
Counsel for Defendants in Error.

Supreme Court of the United States.

OCTOBER TERM, 1899.

NUMBER 241.

FRED HEWITT,

Plaintiff in Error,

v.

EMIL SCHULTZ and FRIEDERIKA SCHULTZ,

ARGUMENT FOR DEFENDANTS IN ERROR.

This case comes to this court upon a writ of error directed to the Supreme Court of North Dakota. The action is in the nature of ejectment to recover the possession of the Northeast quarter of Section 13, Township 132 North of Range 57, West, Sargent County, North Dakota. The land is situated within the first indemnity or forty and fifty mile limits of the grant to the Northern Pacific Railroad Company by act of Congress approved July 2, 1864 (13 Stat., 365).

The complaint is in the usual form and alleges title, right to possession, ouster by the defendants, and prays for a recovery of the possession of the premises (Transcript p. 3).

The answer contains first a general denial of all the allegations of the complaint, except the possession of the premises by the defendants which is admitted. The answer also contains an equitable defense and counterclaim, allowed under the practice in North Dakota, setting up a full equitable title in the defendants to the lands in controversy (Transcript pp. 4-24).

The answer alleges that through proceedings in the land department of the United States, taken under a mistake of law, a patent for the lands described was issued to the plaintiff, and concludes with a prayer that the defendants be decreed to be the equitable owners of the premises, and that the plaintiff be decreed to hold whatsoever title he has acquired by virtue of the patent in trust for the benefit of the defendants.

The equitable title of the defendants is denied in plaintiff's reply (Transcript pp. 24-28).

The case was tried before the court without a jury, upon an agreed statement of facts. (Transcript pp. 29-44). This statement was adopted by the court and incorporated in its findings (Transcript pp. 44-61).

The District Court of Sargent County, where the case was tried, rendered judgment for the plaintiff and this judgment was reversed by the Supreme Court of North Dakota and judgment there entered

dismissing the complaint. (Transcript, pp. 85-86).

PLAINTIFF'S TITLE.

The facts upon which plaintiff bases his title are as follows:

April 10, 1882, plaintiff was qualified to acquire lands under the pre-emption law of the United States, and on that date he settled upon and improved the premises in controversy with the intention of entering the same under the act of congress approved September 4, 1841, and on November 2, 1882, he presented to the United States land office at Fargo his declaratory statement for said tract, which was received and filed. (Finding X. Transcript p. 56).

Plaintiff resided upon and cultivated the land from April 10, 1882, to April 4, 1883, when he submitted final proof therefor and tendered the government price for the land. Plaintiff's final proof was rejected by the local officers, who assigned as a reason therefor that the land in question had been withdrawn from entry for the benefit of the Northern Pacific Railroad Company, as hereafter more fully stated. Plaintiff appealed from the decision of the local officers to the commissioner of the general land office who, on October 5, 1883, affirmed the decision of the local officers. Plaintiff had no notice of this last decision until about Aug-

ust 1, 1888, at which time he made application for a review thereof to the commissioner of the general land office, and that officer, on September 25, 1888, rendered a decision reversing his former ruling, and decided that plaintiff's final proof should be received. (Finding XI., Transcript p. 56).

The Northern Pacific Railroad Company appealed from the decision of the commissioner of the general land office to the secretary of the interior, and on August 11, 1894, the secretary of the interior affirmed the decision of the commissioner, and directed that plaintiff's final proof be received.

The decisions of the commissioner of the general land office and of the secretary of the interior appear at length in the record. (Finding XI., Transcript pp. 56-58).

In pursuance of these decisions, final proof having been made by the plaintiff, letters patent of the United States were issued on June 22, 1895, purporting to convey to the plaintiff the premises in controversy. (Finding XI., Transcript p. 58).

Plaintiff resided upon the land from April 10, 1882, to June 21, 1884 (Finding XI., Transcript p. 58).

DEFENDANT'S TITLE.

By act of congress approved July 2, 1864, lands were granted to the Northern Pacific Railroad Company to aid in the construction of a line of railroad from a point on Lake Superior westward to Puget Sound. Section 3 is as follows:

"That there be, and hereby is, granted to the Northern Pacific Railroad Company, its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific Coast, * * * * every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in th eoffice of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. * * * * * " **(Finding I,** Transcript p. 45).

On May 26, 1873, the railroad company filed in the office of the commissioner of the general land office a map of the definite location of that portion

of its road in Dakota Territory extending from the Red River of the North to the Missouri river. (Finding V, Transcript p. 48).

Upon the filing of the map of definite location the commissioner of the general land office marked and designated upon the maps and records of his office the limits of the lands granted by congress to said railroad company, namely; forty (40) and fifty (50) miles on each side of said line of definite location, and on June 11, 1873, the commissioner of the general land office, acting under the direction of the secretary of the interior, transmitted a diagram showing the situation of said lands with reference to the line of definite location, together with a letter of instructions, directing the local land officers to withdraw and withhold from sale or entry all the odd numbered sections, both surveyed or unsurveyed, falling within those limits, and this letter and diagram were duly received at the United States district land office at Pembina, D. T., (that being the district within which the lands in controversy were then situated), June 24, 1873. (Finding V., Transcript pp. 48-49).

The land in controversy was coterminous with this line of definite location and more than forty and less than fifty miles distant therefrom and within the indemnity limits, and was, at the date of the grant, at the date when said line was definitely fixed by filing the plat in the office of the commissioner of the general land office, and at the date of said order of withdrawal, and at the date of receipt of said order of withdrawal, and at all times

herein mentioned, except as hereinafter set out, public land to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, and was and is non-mineral in character. (Finding V., Transcript p. 49).

This order of withdrawal remained in force until revoked by the secretary of the interior, August 15, 1887. (Finding V., Transcript p. 49).

The railroad company constructed the whole of its line from Lake Superior to Puget Sound, including the portion opposite the land here in controversy, in all respects as required by said act. (Finding VI., Transcript p. 50).

March 19, 1883, the Northern Pacific Railroad Company filed in the land office at Fargo, Dakota, a list of selections under its grant, embracing the land in controversy, and claiming said tract as indemnity under the act of July 2, 1864; and paid to the receiver of the land office the fees required by law.

Thereupon the local officers, after examining the list of the lands so selected, attached to the list a certificate (set out at length in the findings), whereby they certified that the filing of the list was allowed and approved, and that the whole of the lands sought to be selected were surveyed public lands of the United States; that no part thereof had been returned as mineral lands, and that there was no homestead, pre-emption, state or other valid claim to any portion of said lands on file or of record in their office. And they further certified to

the payment of the fees as required by law. (Finding VII., Transcript pp. 50-51).

The findings set out at length the instructions of the secretary of the interior under which this selection was made, and by the terms whereof it was directed that the Northern Pacific Railroad Company should not be required to file lists of losses with its selection lists, it being directed that the work of ascertaining the losses to be used as basis for the selections should be performed in the office of the commissioner of the general land office. (Finding VII., Transcript pp. 50-53).

A further statement of the steps taken by the railroad company for the purpose of complying with subsequent directions given by the secretary of the interior in the matter of specifying the loss as a basis for its selection of the land in question is given in a subsequent portion of this brief, under the discussion of the selection.

By a contract dated June 21, 1884, the railroad company agreed to sell, and the defendant, Emil Schultz, agreed to buy, in consideration of the payment of $1,200.00, the land in controversy, and on payment of the purchase price, on December 18, 1889, the railroad company conveyed to Schultz by warranty deed the land covered by his contract. (Finding XIII., Transcript p. 58).

Upon these facts the Supreme Court of North Dakota held that the land covered by the patent issued to Hewitt was withdrawn from entry when his claim was initiated by virtue of the order of withdrawal of June 11, 1873. The court held the

patent void and dismissed the action. The opinion is printed at pages 86-91 of the transcript and reported in 7 North Dakota, 601.

ARGUMENT.

If the lands were withdrawn when the plaintiff initiated his claim by filing his pre-emption declaratory statement, November 2, 1882, he acquired no rights and the land was subject to the selection of the railroad company on May 19, 1883. Sections 2257 and 2258 of the Revised Statutes of the United States provide what lands shall be subject to the right of pre-emption and what lands may not be acquired in this manner. Those sections are as follows:

Section 2257:—"All lands belonging to the United States, to which the Indian title has been or may hereafter be extinguished, shall be subject to the right of pre-emption, under the conditions, restrictions, and stipulations provided by law."

Section 2258:—"The following classes of lands, unless otherwise especially provided for by law, shall not be subject to the rights of pre-emption, to-wit:

First—*Lands included in any reservation by any treaty, law, or proclamation of the president, for any purpose.*

Second—Lands included within the limits of any incorporated town, or selected as the site of a city or town.

Third—Lands actually settled and occupied for purposes of trade and business, and not for agriculture.

Fourth—Lands on which are situated any known salines or mines."

Lands withdrawn from entry by order of the commissioner of the general land office are lands included in a reservation by proclamation of the president" and fall within the first exception to section 2258 supra. *Wolsey v. Chapman*, 101 U. S. 755, 769.

It is well settled that where the executive officers of the government attempt to dispose of lands under the pre-emption law which fall within these exceptions, they act beyond their jurisdiction and their acts are void, and a patent issued upon an entry of land not subject to the jurisdiction of the land department does not pass the legal title and such a patent may be challenged in an action at law. This was the conclusion reached in *Burfening vs. Chicago, St. Paul, Minneapolis and Omaha Ry. Co.*, 163 U. S. 321.

This was an action of ejectment brought to recover possession of certain islands in the Mississippi river and within the corporate limits of the city of Minneapolis. The plaintiff relied upon a patent of the United States, purporting to convey the land in question, based upon a soldier's additional homestead entry. The patent was dated June 13, 1884, and the plaintiff's right was initiated March 27, 1883, on which latter date he applied to enter the land in question. The land department allowed the entry and issued patent, and it was insisted at the trial, upon the part of the plaintiff, that the determination by the land department that the land in question was subject to entry at the date when the patentee's right was

initiated was conclusive. The court conceded that where the patentability of public lands depends upon questions of fact which are committed to the consideration and determination of the land department, such determination is final, as, for instance, the determination by the department that a certain tract is swamp land or saline land or mineral land. The court says, however:

"But it is also equally true that when, by act of congress, a tract of land has been reserved from homestead and pre-emption or dedicated to any special purpose,proceedings in the land department in defiance of such reservation or dedication, although culminating in patent, transfer no title and may be challenged in an action at law. In other words, the action of the land department cannot over-ride the expressed will of congress, or convey away public land in disregard or defiance thereof."

The court therefore held that the patent was void and the plaintiff could not recover.

It follows, therefore, in the case at bar that if the land in controversy was withdrawn from entry when the plaintiff tendered his pre-emption declaratory statement on November 2, 1882, the land officers were without jurisdiction to receive his application and no rights were acquired by the plaintiff which would defeat the selection of the railroad company made May 19, 1883.

THE WITHDRAWAL.

But it is contended by the plaintiff that the commissioner's order of withdrawal of June 11, 1873, was void and the land in question was open to preemption when plaintiff filed his application.

This was the view taken by the secretary of the interior in 1894. In this decision the secretary reversed the decision of the commissioner of the general land office rendered in 1883 when that officer had held that the withdrawal was valid and that the plaintiff acquired no rights.

Before considering the question of the authority of the commissioner of the general land office to order a withdrawal of indemnity lands for the benefit of the Northern Pacific Railroad Company, it will be proper to consider generally the authority of the land department over the public domain and the authority of its officers to withdraw from the operation of the general land laws of the United States lands otherwise open to acquisition under those laws.

The question was first squarely presented to this court in *Wolcott vs. Des Moines Co.*, 5 Wall. 687. In this case the following facts appeared:

By act of congress, August 8, 1846, there was granted to the then territory of Iowa:

"For the purpose of aiding said territory *to improve the navigation of the Des Moines river from its mouth to Raccoon Fork*, so called, in said territory, one equal moiety in alternate sections, of the public lands, in a strip five miles in width on each side of said river."

It appeared that the Des Moines river flows from the northern boundary of Iowa and empties into the Mississippi river at the southeast corner of the state, and receives the waters of the Raccoon Fork about the middle of the state.

The extent of the land grant under this act was the subject of continuous conflict of opinion. For a time it was held by the officers of the land department that the grant extended the full length of the Des Moines river in the territory, and then that it extended only to the mouth of the Raccoon Fork. The courts were also divided upon the question until the latter construction was finally placed upon the act by this court in *Railroad Company vs. Litchfield,* 23 Howard, 66.

By the terms of the grant, the lands inuring to the territory were to be selected subject to the approval of the secretary of the treasury and, under the construction of the act that the grant extended above the Raccoon Fork, thousands of acres so situated were patented under the grant and all of the odd numbered sections within five miles of the river above Raccoon Fork were withdrawn. Then came the decision by this court, holding that the grant did not extend above Raccoon Fork.

The validity of the executive order of withdrawal of the odd numbered sections above the Fork was presented in this wise: May 15, 1856, congress passed an act granting to the state of Iowa to aid in the construction of certain specified railroads, every alternate section (designated by odd num-

bers) for six sections in width on each side of said roads, with the following proviso:

"That any and all lands heretofore reserved to the United States by any act of congress, or *in any other manner by competent authority, for the purpose of aiding in any objects of internal improvement, or for any purpose whatsoever, be, and* the same is hereby, reserved from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands. * * * * "

It was contended that this grant to the state for the benefit of the railroads passed title to the lands covered by the executive withdrawal above Raccoon Fork. It was admitted that these lands passed unless excluded by the proviso. The court sustained the validity of the withdrawal, and said:

"It has been argued that these lands had not been reserved by competent authority, and hence that the reservation was nugatory; as we have seen they were reserved from sale for the special purpose of aiding in the improvement of the Des Moines river—first, by the secretary of the treasury, when the land department was under his supervision and control, and again by the secretary of the interior, after the establishment of this department, to which the duties were assigned, and afterwards continued by this department under instructions from the president and cabinet; beside, if this power was not competent, *which we think it was* ever since the establishment of the land department, and which has ben exercised down to the present time, the grant of the 8th of August, 1846, *carried along with it by necessary implication, not only the power but the duty of the land office to reserve from sale the lands embraced in the grant, otherwise its object might be utterly defeated.* Hence immediately upon a grant being made by congress for any of these public purposes to a

state, notice is given by the commissioner of the land office to the registers and receivers to stop all sales either public or by private entry. Such notice was given the same day the grant was made in 1856 for the benefit of these railroads. That there was a dispute existing as to the extent of the grant in 1846 in no way affects the question. The serious conflict of opinion among the public authorities on the subject made it the duty of the land officers to withhold the sales and reserve them to the United States till it was ultimately disposed of."

To the same effect is *Wolsey vs. Chapman*, 101 U. S., 755.

The precise question here presented of a patent issued upon an attempted pre-emption of land covered by an executive withdrawal was considered in *Riley vs. Welles*, 154 U. S., 578.

In that case the same withdrawal as that considered in the two cases last above cited was before the court and it appeared that the defendant had applied to enter the land in controversy under the pre-emption law and that a patent had issued to him. The court held the allowance of the entry and the issuance of the patent to be acts done in violation of law. See also *Wood vs. Beach*, 156 U. S., 359; *Spencer vs. McDougal*, 159 U. S., 62; *Musser-Sauntry, Etc., Co. vs. Northern Pacific Rd. Co.*, 168 U. S., 604.

In the case at bar the decisions of the commissioner of the general land office, and of the secretary of the interior, allowing plaintiff's entry and holding the withdrawal of the indemnity lands upon definite location to be void are based upon the previous decisions of the secretary in the cases

of *Northern Pacific Railroad Company vs. Guilford Miller*, 7 Land Decisions 100 and *Jennie L. Davis vs. Northern Pacific Railroad Company*, 19 Land Decisions 87.

In his decision in the Guilford Miller and Davis cases the secretary questions the general authority of the executive officers of the government to make orders of withdrawal, the decisions of this court on the subject being passed over without mention. This question, however, must be considered as settled.

The secretary finally concludes in these cases that the order withdrawing from the operation of the general land laws lands in the indemnity belt of the Northern Pacific grant was void and without effect to reserve these lands from pre-emption and bases his conclusions on two grounds:

First: That the legislative withdrawal under the provisions of section 6, the act of July 2, 1864, of lands within forty miles of the line of the road, upon filing of the map of general route, was intended by congress to be exclusive of any authority in the land department to withdraw lands in the indemnity belt after definite location.

Second: That section 6 contains in express terms a prohibition against the withdrawal of indemnity lands by executive authority.

IS THE LEGISLATIVE WITHDRAWAL EXCLUSIVE?

The language of the sixth section of the granting act, operating to effect a preliminary withdrawal of all odd numbered sections of land within forty miles of the line of general route, is passed on in *Buttz vs. Northern Pacific Railroad Company*, 119 U S. 55, as follows:

"The sixth section declares that after the general route shall be fixed, the president shall cause the land to be surveyed for forty miles in width on both sides of the entire line as fast as may be required for the construction of the road and that the odd sections granted shall not be liable to sale, entry or pre-emption, before or after they are surveyed, except by the company. * * * When the general route of the road is thus fixed in good faith and information thereof given in the land department by filing the map thereof with the commissioner of the general land office or the secretary of the interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side."

And immediately following, in the same opinion, the court declares the purpose of this preliminary legislative withdrawal:

"The object of the law in this particular is plain, it is to preserve the land for the company to which, in aid of the construction of the road, it is granted."

It is by virtue of these provisions, so construed by this court, that the secretary of the interior concludes that it was the intention of congress that no withdrawal of indemnity lands should be made after the definite location of the road. He says:

"Congress, the supreme power, having thus ordered a withdrawal from sale and entry of a portion of the lands within the limits of the grant, it must be assumed that it does so to the entire exclusion of any subordinate authority and that its action on that behalf is intended to be exhaustive." (19 L. D. p. 89).

The secretary loses sight not only of the particular purposes for which this withdrawal on general route was provided, but of the intent of the whole act as apparent from its liberal terms and also a consideration of the circumstances under which the grant must be adjusted and which congress must have anticipated.

The preliminary withdrawal was for the purpose of securing the company between the time of filing its map of general route and its map of definite location. It was, of course, in contemplation that the general route of the road would be located within a comparatively short time after the passage of the granting act, but that it would require a much longer period to complete the explorations and accurate surveys necessary to a final definite location of the line. This in fact, turned out to be the case, for, although the maps of general route were filed in 1870, 1872 and 1873, the final maps of definite location were not filed until 1884. The preliminary withdrawal of forty miles on each side of the line of general route provided by congress to remain in force up to the time of definite location, was amply sufficient to substantially secure the rights of the company during that period. The line of the road being only approximately determined

by the map of general route, lands in the indemnity belt not then ascertained as such would have a speculative value, at the most, very remote, and the rush of settlers to appropriate these lands, induced by the prospect of a railroad and the consequent development of the country, could not have been looked for until the date of the definite location, when, for the first time, their proximity to the railroad would be assured.

It is submitted that this preliminary legislative withdrawal, instead of evidencing an intention on the part of congress that this exercise of the power of withdrawal should be exclusive, shows a disposition to protect the company in its full rights under the grant. As before stated, the withdrawal on general route was ample to protect the company up to the time of the definite location of its line, when its present grant of lands in place took effect and the limits of its indemnity belt became fixed. When this point was reached the function of the withdrawal on general route was fulfilled and at the same time by the terms of the grant, the right of selection of indemnity arose, the direction of which was expressly committed to the secretary of the interior. It is important to observe that without the withdrawal, the validity of which is here in issue, the right of selection would have been a barren right. By the act of June 2, 1862 (12 Stat. 413), the right of pre-emption was extended to all unsurveyed lands as well as surveyed lands, and, but for the executive withdrawal, the entire indemnity belt of the company's grant would have been

subject to appropriation for a long period of time during which the company could have made no selection. The right of selection by the terms of the act creating it, was limited to odd numbered sections and until the indemnity lands were surveyed, the odd numbered sections must remain unascertained.

It seems plain that no intention on the part of congress to curtail the powers of the executive in respect to this particular grant, exercised without question in a score of other cases, can be predicated on the provision of section six creating a legislative withdrawal from the location of the general route to the time of definite location. Substantial, and indeed conclusive, evidence of this view is found in the joint resolution of May 31, 1870 (10 Stat. 378), amendatory of and supplemental to the original granting act of July 2, 1864. By the joint resolution of 1870, the company was given the right in any state or territory to select odd numbered sections of land within ten miles beyond the limits prescribed in the act of 1864, in lieu of lands lost from the grant betwen the date of the act, July 2, 1864, and the date of definite location.

It is inconceivable that congress would create a right of selection by the act of 1864, which we have shown was a barren right, without the usual protection of an executive withdrawal, and six years later, by an act amendatory of the original granting act, give such plain evidence of its intention that the company should enjoy to the full extent

the benefits conferred and intend that its first provision for indemnity should be a nullity.

In construing this grant in *Northern Pacific R. R. Co. vs. St. Paul, Minneapolis & Manitoba R. R. Co.*, 26 Fed. 551-554, Mr. Justice Brewer, sitting at circuit, indicates the rule which must control its construction, that the conditions apparent to congress at the time of its passage must be kept in view. He says:

"While the grant is vast, the line to be constructed in order to earn it, is continental. The grant was made because congress believed the public good required the road, and, in view of the length of the line, the character of the country through which it was to pass, the paucity of settlements therein, and the supposed difficulties in the operation of a road in that northern latitude, it is *fairer to presume that congress intended the freest bounty rather than to believe* that it burdened the grant with extra exceptions which when construction became feasible might largely deplete it of value."

Referring again to the case of *Wolcott vs. Des Moines River Co.*, 5 Wall. 687, it will be observed that the court says that the granting act there under consideration, "*carried along with it, by necessary implication, not only the power but the duty of the land office to reserve from sale the lands embraced in the grant, otherwise its object might be utterly defeated.*"

A careful examination of the act in question (August 8, 1846, 9 Stat. 77) discloses that the provision referred to by the court was the requirement that the lands granted should be selected by an agent of the territory, "subject to the approval of

the secretary of the treasury of the United States."

Place this provision side by side with the provision of section three of the Northern Pacific granting act, giving the right of indemnity, which is as follows: "Other lands shall be selected by said company in lieu thereof, *under the direction of the secretary of the interior,*" and the conclusion follows that the Northern Pacific grant carried with it not only the power but the duty to reserve the indemnity lands for the benefit of the company.

The proposition laid down by the secretary of the interior where he says:

"Congress, the supreme power, having thus ordered a withdrawal from sale and entry of a portion of the lands within the limits of the grant, it must be assumed that it does so to the entire exclusion of any subordinate authority, and that its action on that behalf is intended to be exhaustive," meets with a conclusive answer in the case of *Wood vs. Beach,* 156 U. S. 549.

In this case Wood attempted to acquire land as a homestead which was within the indemnity limits of the grant to the Leavenworth, Lawrence & Galveston Railway Company, and also within the like limits of the grant to the Missouri, Kansas & Texas Railway Company. The land had been withdrawn under both grants by departmental orders prior to the settlement of Wood. After citing, with approval, the Des Moines River case, the court say of the withdrawals for the benefit of the railroad companies:

"These withdrawals were not merely executive acts, but the latter one, at least, was in obedience to the direct command of congress. Section 4 of

the act granting lands to aid in the construction of what is now known as the Missouri, Kansas & Texas Railway (14 Stat. at Large, 290) is as follows:

"'Sec. 4. And be it further enacted, that as soon as said company shall file with the secretary of the interior maps of its line, designating the route thereof, it shall be the duty of the said secretary to withdraw from the market the lands granted by this act in such manner, as may be best calculated to effect the purposes of this act and subserve the public interests'."

The grant for the benefit of the Missouri, Kansas & Texas road was a place grant of the odd numbered sections within ten miles on each side of the line of road with a right of indemnity selection within twenty miles. The withdrawal thus sustained by the supreme court was of indemnity lands.

Section 6 of the grant to the Northern Pacific Railroad Company provides that, after filing the map of general route, "the odd sections of land hereby granted shall not be liable to sale, entry or pre-emption." This is the congressional withdrawal which the secretary of the interior insists must be held to be exclusive of any withdrawal by a subordinate authority.

But in *Wood vs. Beach*, a direction to the secretary to withdraw from market "the lands granted by this act," was held not to exclude his authority to withdraw indemnity lands. If it be contended that indemnity lands are "lands granted," then the land in controversy in this case was withdrawn

by virtue of the provisions of section 6 above noted, but if indemnity lands are not "lands granted," then a statutory withdrawal of granted lands does not exclude the authority of the executive to withdraw indemnity lands.

DOES SECTION SIX PROHIBIT A WITHDRAWAL BY EXECUTIVE ORDER?

As before stated, the secretary places his decision, holding the withdrawal in question void, on two grounds. The first ground alleged has been discussed.

The second ground is that section six of the act of July 2, 1864, contains in express terms a prohibition against withdrawal of indemnity lands by the executive. The language construed to contain this prohibition is that which is printed in italics in the following quotation of section 6:

"Sec. 6. And be it further enacted, That the president of the United States shall cause the land to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad, *and the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed except by said company as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twenty, eighteen hundred and sixty-two, shall be and the same are hereby extended to all other lands on the line of said road*

when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre when offered for sale."

It is declared by the secretary, that the provisions extending the pre-emption law and the homestead law to all other lands on the line of said road when surveyed, forbids the executive from withdrawing from the operation of the pre-emption and homestead laws any lands lying in the indemnity limits of the grant as determined by the map of definite location. An examination, however, of the pre-emption law as then in force, and a reading of this particular portion of the granting act in connection with that law, will show almost to a demonstration that the construction contended for is not only unreasonable but impossible. The pre-emption law of September 4, 1841 (5 Stat. 453), in section 10, after declaring the qualifications and conditions for acquiring public lands by pre-emption and extending the operation of the act to all *surveyed* lands, proceeds to define certain classes of land to which the pre-emption right shall not extend, including land reserved for the support of schools, lands included within the corporate limits of towns, lands on which are situated salines or mines, and further in terms as follows:

"No section of land reserved to the United States as alternate to other sections granted to any of the states for the construction of any canal, railroad, or other public improvement."

This exception of sections reserved to the United States alternate to others granted for the construction of canals, railroads or other public improvements, remained in force until March 3, 1853. At that time the following statute was enacted (10 Stat. 244):

"An act to extend pre-emption rights to certain lands therein mentioned.

"Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,

"That the pre-emption laws of the United States as they now exist, be, and they are hereby, extended over the alternate reserved sections of public lands along the lines of all the railroads in the United States wherever public lands have been or may be granted by acts of congress; and that it shall be the privilege of the persons residing on any of said reserved lands to pay for the same, in soldier's bounty land warrants estimated at a dollar and twenty-five cents per acre, or in gold and silver or both together, in preference to any other person, and at any time before the same shall be offered for sale at auction: *Provided*, that no person shall be entitled to the benefit of this act, who has not settled and improved, or shall not settle and improve such lands prior to the final allotment of the alternate sections to such railroads by the general land office. *And provided further*, that the price to be paid shall in all cases be two dollars and fifty cents per acre or such other minimum price as is now fixed by law or may be fixed upon lands hereafter granted; and no one person shall have the right of pre-emption to more than one hundred and sixty acres; *and provided further*, that any settler who has settled, or may hereafter settle on lands heretofore reserved on account of claims under French, Spanish or other grants, which have been or shall be hereafter declared by the supreme court of the United States to be invalid, shall be entitled to all the rights of pre-

emption granted by this act and the act of fourth of September, eighteen hundred and forty-one, entitled 'An act to appropriate the proceeds of the public lands and to grant pre-emption rights, after the lands shall have been released from reservation in the same manner as if no reservation existed." Approved March 3, 1853.

The effect of this act was to modify materially the restrictive clause in the act of 1841 withholding from the operation of the pre-emption law sections reserved to the United States, alternate to others granted for the construction of railroads and other public improvements. The plain reading of the act of March 3rd, 1853, shows that its effect was to remove the restriction contained in the pre-emption law of 1841, as to sections alternate to railroad lands from the passage of the act up to the time of "final allotment of the alternate sections to such railroads by the general land office." The act was so construed by the rules of the general land office quoted below (1 Lester, p. 509):

"SYNOPSIS OF RULES ADOPTED BY THE GENERAL LAND OFFICE FOR THE RAILROAD DESK.

"First: By the act of 4th September, 1841 (No. 48). 'No sections of land reserved to the United States, alternate to other sections, granted to any of the states, for the construction of any canal, railroad, or other public improvement,' are subject to the operation of said act. But—

"Secondly: The act of 3rd March, 1853 (No. 222), and Act of 27th March, 1854 (No. 234), materially modify the restrictive or interdictive clause in the Act of 1841. The act of March 3d, 1853, steps in and partly takes off the inhibition contem-

plated in Act of 1841 by extending the pre-emption laws, at a price of $2.50 per acre, 'over the alternate reserved sections of public lands along the lines of the railroads of the United States,' *where the party had settled and improved the land 'prior* to the *final allotment* of the alternate sections to such railroads, by the General Land Office.'

"Pre-emptions under this Act of 1853, attach within the following periods, to the *United States reserved sections*: 1. Form the date of the 'definite location' of the road (viz., according to the Attorney General's opinion, February 16, 1857), *when the route is surveyed and staked off on the ground*, until the 'final allotment,' by the General Land Office, of the railroad sections, and that is the *date of official list* certifying the latter sections to the State.

"We take the 'definite location' of the route as the period when this Act of 1853, with its $2.50 price applies, for the reason, not only that such seems to be the current of official decisions, but because, up to such 'definite location' there really are no United States alternate sections so set apart, as would be notice, or grounds of inquiry to purchasers. 2. Pre-emption will not attach under this law to the *United States reserved sections*, after the date of 'final allotment,' to the day of offering at public sale, for the reason that the interdicting clause in the Act of 1841, *again applies* to the United States alternate reserved sections aforesaid, the Act of 1853 only taking it off up to the period of final allotment."

It will be observed further, that the act of March 3rd, 1853, although partially removing the restrictions as to alternate sections of railroad grants contained in the pre-emption law, increased the price per acre at which these lands might be acquired during the period contemplated by the act of 1853, to $2.50 per acre. The right of settlers

to acquire lands within the limits of railroad grants alternate to the lands granted for the benefit of railroad companies, was governed by these two acts at the time of the passage of the act of July 2, 1864. Prior to 1853, when the pre-emption law was extended, under the restriction noticed, to these alternate sections, all grants for the construction of railroads, canals and other public improvements, had been made, not to incorporated companies, but to states for the benefit of such companies as might thereafter be incorporated and should comply with the legislation of the respective states controlling the disposition of land granted to them.

Under the practice just indicated and in force in 1853, considerable time would necessarily elapse between the date of the grant to a particular state and the time when the company organized under the legislation of such state would earn the land and the state would become entitled to demand from the general land office that the land in question be certified to it. The grant of July 2, 1864, to the Northern Pacific Railroad Company, was one of the first instances of a departure from the former uniform practice of granting lands for railroads to states instead of directly to railroad companies. The grant to the Northern Pacific being in terms a present grant and its right to the lands enuring upon the definite location of its line, the period contemplated by the act of 1853 during which the restriction contained in the pre-emption law was removed could not arise. The act of 1853 extended the operation of the pre-emption law over

the alternate reserved sections up to the time when the granted lands should be finally allotted by the general land office. Under the provisions of the act of July 2, 1864, no period would arise during which the act of March 3rd, 1853, could operate. As indicated by the construction placed by the department on the act of 1853, the alternate reserved sections were open to pre-emption from the time of the definite location of a road to the time of final allotment, it being considered that no sections could be identified as "alternate reserved sections" until the definite location of the line. Under the act of 1864,the company took a present title without "final allotment" by the land office, to its granted sections immediately upon the filing of its map of definite location, and to continue and extend the spirit of the act of 1853, the particular language under consideration was inserted in the grant to the Northern Pacific Railroad Company. Without an extension in terms of the pre-emption and homestead laws to the reserved sections in the place limits of the company's grant, no rights to these lands could be acquired thereunder and, extending the policy which brought about the act of 1853 and which has been followed in every grant since the passage of the act of July 2, 1864, this language was inserted:

Grant to California and Oregon Railroad Company, act of July 25, 1866, section 2 (14 Stat. 239); grant to Atlantic and Pacific Railroad Company, act of July 27, 1866, section 6 (14 Stat. 292); grant to Stockton and Copperopolis Railroad Company,

act of March 2, 1867, section 5 (14 Stat. 548); grant to Oregon Central Railroad Company, act of May 14, 1870, section 2 (16 Stat. 94); grant to Texas and Pacific Railroad Company, act of March 3, 1871, section 12 (16 Stat. 573). In all of these grants by various provisions the pre-emption law was extended to the reserved alternate sections. That the effect of these provisions and of the language in section 6 of the Northern Pacific act was to carry out the spirit of the act of March 3, 1853, and not to forbid a withdrawal of indemnity lands is demonstrated by an examination of the act of July 13, 1866, granting lands to the Placerville and Sacramento Valley Railroad Company (14 Stat. 94). Section 5 of this act is almost word for word the same as section 6 of the Northern Pacific act. But the Placerville and Sacramento grant *contains no indemnity provision* and the only possible purpose for inserting such language was in pursuance of the settled policy to cover the exception in the pre-emption law relating to the reserved sections. And this was the construction placed upon section 6 of the Northern Pacific act before this exception of the pre-emption law was repealed in 1874 by the adoption of the Revised Statutes, and when the executive officers of the government were familiar with the history of legislation. The first interpretation put upon this language is found in a letter of Secretary Usher to the commissioner of the general land office, dated March 9, 1865, transmitting the so-called "Perham Map." This

letter is quoted in the opinion in *Oregon & C. R. Co. v. U. S.* 77 Fed. Rep. 79; 48 U. S. App. 6, and is as follows:

"Department of Interior.

Washington, D. C., March 9th, 1865.

"Sir:—

"Herewith I transmit a map upon which the 'general line' of the Northern Pacific Railroad, as adopted by the board of directors of that railroad company, is delineated; also a copy of the letter of the president of said company, dated the sixth instant, requesting that the granted lands along said line be withdrawn from market. In view of the provisions of the 3rd and 6th sections of the act of congress, approved July 2, 1864, (Pamphlet Laws, pages 368-369), should you perceive no objection, I think that the odd-numbered sections along the line for ten miles in width on each side, in Minnesota and Wisconsin, and for twenty miles in width on each side along that part of the line extending through the territories westward to Puget Sound, may be withdrawn as requested, as preliminary to the final survey and location of said railroad. *The even-numbered sections along the line will, however, be subject to disposal by the United States, as provided in the 6th section of said act of congress.*

"Very respectfully, your ob't. servant,

"J. P. USHER, Secretary.

"The Commissioner of the General Land Office."

The concluding sentence of this letter shows that in 1865 the provisions of section 6 were understood to refer to the even numbered reserved sections. Moreover, the conclusion of the secretary that section 6 in terms extends the homestead and pre-emption laws to lands in the indemnity limits and forbids their withdrawal is reached without a

consideration of the acts of 1841 and 1853 here discussed, and furthermore without giving effect to the words "when surveyed," which occur near the close of the section.

By the terms of the act the pre-emption and homestead laws are only extended to "all other lands on the line of said road" *when surveyed,* and this language must be read in connection with the first provision of the section, to-wit:

"The president of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road."

This restriction that the pre-emption and homestead laws should not extend to the alternate reserved sections until surveyed is in full accord with the policy of the act of 1853, for in 1853 unsurveyed lands were not subject to pre-emption.

Furthermore, it is important to observe that, by the passage of the act of June 2, 1862 (12 Stat. 413), two years before the passage of the Northern Pacific granting act, the right of pre-emption was extended to all lands belonging to the United States to which the Indian title had been or should be extinguished "under the conditions, restrictions and stipulations" contained in the pre-emption law of 1841. By this it will be seen that under the construction of section 6, act of July 2, 1864, contended for by the secretary of the interior, congress must be held to have enacted that the pre-emption and homestead laws should be extended to the unsurveyed lands situated in the indemnity belt of the grant to the company *when surveyed,* although

two years earlier the same laws had been extended to these same lands.

THE DECISION OF THE SECRETARY IS CONTRARY TO THE SETTLED CONSTRUCTION OF THE ACT.

For nearly twenty years, the construction placed by the Interior Department upon the Northern Pacific grant was uniform and sustained the power of withdrawal of indemnity lands. Between 1871 and 1887 more than forty withdrawals of indemnity lands were made and the authority to make such withdrawals remained unquestioned until the decision by the secretary in the Guilford Miller case in 1888. The reports of land decisions by the secretary previous to 1888 are filled with cases in which the validity of these withdrawals was sustained. In the case of Prest vs. Northern Pacific Railroad Company 2 Land Decisions, 506 and in the letter of instructions of Secretary Teller, dated May 17, 1883, 2 Land Decisions 511, the question is considered at length and the power of withdrawal sustained. This construction prevailed during the terms of Secretaries Usher, Browne, Cox, Delano, Kirkwood and Teller.

In *United States vs. Pugh* 99 U. S. 269, this court said: "It is a familiar principle of interpretation that in a case of doubtful and ambiguous law, the contemporaneous construction of those who have

been called upon to carry it with effect is entitled to great respect."

In *United States vs. Moore,* 95 U. S. 763, this court gave one of the reasons for this rule: "The officers concerned are usually able men and masters of the subject. Not infrequently they are the draughtsmen of the laws they are afterwards called upon to interpret."

The construction of the executive officers, to which the courts give weight, is the *contemporaneous* and continued construction. Every intendment is in favor of the correctness of the practical construction with which Secretary Vilas was confronted when he announced the doctrine of the Guilford Miller case, but his own decision in that case over-ruling the long settled construction must rest solely upon his argument which we have undertaken to show ignores important and indeed controlling considerations and leads to a conclusion which is incorrect. The conclusion of the supreme court of North Dakota sustaining the power of withdrawal is supported by *Thompson vs. St. P. & M. Ry. Co.,* 83 Fed. Rep. 546, and *Southern Pacific Railroad Co. vs. Groeck,* 87 Fed. Rep. 970. In the latter case, decided by the circuit court of appeals for the Ninth circuit, the court construed section 6 of the grant by act of congress of July 27, 1866 (14 Stat. 292). Section 6 of this act is identical with section 6 of the Northern Pacific act. The court held not only that section 6 did

not forbid a withdrawal of indemnity lands, but constituted a statutory withdrawal after definite location.

THE SELECTION WAS PRIOR TO ANY RIGHTS ACQUIRED BY THE PLAINTIFF.

If it be held that the legal title to the land in controversy passed by the patent for the reason that the withdrawal was revoked when the patent issued, although in force when the plaintiff filed his declaratory statement, nevertheless the patentee must be held trustee of the legal title for the benefit of the defendant. The principle is well established that where, through an erroneous construction of the law, the land department awards to one the patent for land to which another has initiated a prior right, the courts will correct the error and hold the patentee trustee for him who has the better right. *St. Paul, etc., R .R. Co. vs. Winona and St. Peter R. R. Co.*, 112 U. S. 720-723; *St. Paul & Pacific R. R. Co. vs. Northern Pacific R. R. Co.*, 139 U. S. 1; *Ard vs. Brandon*, 156 U. S. 537; *Johnson vs. Towsley*, 13 Wall. 72; *Shepley vs. Cowan*, 91 U. S. 330; *Moore vs. Robbins*, 96 U. S. 530.

The land in question being reserved by executive order during the whole period of plaintiff's occupation, and at the date of his application to enter the land, the railroad company was prior in time with its selection of March 19, 1883.

It appears by the findings (Finding VII., Transcript p. 50), that on March 19, 1883, the North-

ern Pacific Railroad Company filed in the United States district land office at Fargo, Dakota, a list of selections under its grant, embracing the tract in question, and paid to the receiver of said office the fees required by law; that the tract was within this land district and within the indemnity limits of the grant and that at the date of said selection the tract was public land of the United States and free from pre-emption and other claims or rights except such claim as plaintiff herein may have had; that the register and receiver of said land district accepted and filed the list and attached thereto a certificate reciting the facts just stated, but making no exception of plaintiff's claim (Finding VII., Transcript p. 50).

It further appears that on May 28, 1883, the secretary of the interior issued the following instructions, to-wit: (Finding VII., Transcript p. 51):

"The Commissioner of the General Land Office,

Sir: It is my desire to open for settlement as speedily as possible all the lands within the indemnity limits of the grant to the Northern Pacific Company not actually required to supply the land lost in place within the granted limits.

The grant should be adjusted at the earliest possible time, that the orders of withdrawal may be vacated without unreasonable delay, as indicated in my letter of the 17th instant.

The unparalleled demand for lands for actual settlement by great numbers of persons, not only from foreign countries, but from the older states, seeking homes under the settlement laws along the line and within the vicinity of the Northern Pacific grant requires for the best interests of the country, and for all parties concerned, that the with-

drawals should not be maintained any longer than is actually necessary for the adjustment of the guaranteed rights of the company.

In order to facilitate the work of making selections, I think you should instruct the local officers that, when clear lists of selections, free from conflict or other objection, are filed with the district officers and approved by them, said selections should at once be marked upon their books and forwarded for final examination, leaving the ascertainment of the lands lost in place to your office, instead of requiring preliminary lists of such lost lands, together with the indemnity lands, tract for tract, from the company as heretofore.

I am satisfied that the work of adjusting the grant will go forward much more rapidly under this plan than under the former practice.

Very Respectfully,
H. M. TELLER,
Secretary."

It appears that on August 4, 1885, the commissioner of the general land office issued the following instructions which were approved by the secretary of the interior, to-wit: (Finding VII., Transcript p. 52):

"Before admitting railroad indemnity selections in any case you will require preliminary lists to be filed specifying the particular deficiencies for which indemnity is claimed. You will then carefully examine your records, tract by tract, to ascertain whether the loss to the grant actually exists as alleged. You will admit no indemnity selection without a proper basis therefor. If you are in doubt whether the company is entitled to indemnity for losses claimed, you will transmit the preliminary lists to this office for instructions and will not place the selections upon record until directed so to do.

"Where indemnity selections have heretofore been made without specifications of loss, you will

require the companies to designate the deficiencies for which such indemnity is to be applied before further selections are allowed. The selecting agent applying to make indemnity selections must state in his affidavit attached to the list presented that the specific losses for which indemnity is claimed are truly set forth and described in said list, and that said losses have not heretofore been indemnified in any manner. Where deficiencies exist, for which indemnity is allowed by law, the lieu selections must be made from vacant, unappropriated land within proper sections and limits nearest the granted sections in which the loss occurred. You will be careful to see that this rule is strictly complied with, and will reject all selections not made in conformity thereto.

"Approved: L. Q. C. Lamar,
Secretary."

It further appears that on October 12, 1887, the Northern Pacific Railroad Company filed in the United States district land office at Fargo a list designating an amount of lands equal to those so selected as aforesaid in the list of March 19, 1883, claimed to have been lost, and excepted from the grant, and which were within the place limits of the grant as defined on definite location, and that these lands were designated as a basis for said selections (Finding VII, Transcript, p. 52).

It further appears that on February 23, 1892, the railroad company filed a re-arranged list describing the lands selected on March 19, 1883, and set opposite each description of land so selected a tract of equal area lost from the place limits of its grant. The particular loss specified as a basis for the selection of the land in controversy was a tract granted to the state of Wisconsin to aid in the con-

struction of certain railroads by act of congress of June 3, 1856 (Findings VII, Transcript, p. 52). The tract so specified as a basis for the selection was situated east of Superior City and on November 15, 1895, the secretary of the interior held that the Northern Pacific act did not grant lands east of Superior City. The secretary, however, directed, in view of the previous uniform construction that the grant extended to Ashland, Wisconsin, that sixty days be allowed the company within which to substitute new losses in place of those situated between Superior and Asland (Finding IX, Transcript, p. 54).

The railroad company complied with this order and specified as a basis for the selection of the land in controversy another tract lost from the place limits by reason of being contained in the Crow Indian Reservation in Montana, but at the same time filed a statement that this substitution was made solely for the purpose of complying with the instructions of the secretary, saving and reserving all rights previously acquired (Finding IX, Transcript, p. 54).

It is submitted that this selection, made in strictest conformity to the requirements of the secretary of the interior, gave the railroad company a paramount right to the land. It was first in time, and therefore first in right. The company selected the land before the plaintiff acquired any right whatsoever, for the land was reserved when he applied to enter, and after the selection, made in accordance with the instructions of the secretary, no ad-

verse claim could attach. *Rudolph Nemitz,* 7. L. D. 80;*S. P. R. R. Co. v. Meyer,* 9 L. D. 250; *N. P. R. R. Co. v. Halvorsen,* 10 L. D. 15; *Lane v. S. P. R. R. Co.,* 10 L. D. 454; *Flippen v. S. P. R. R. Co.,* 14 L. D. 418.

That the selection was made in accordance with the directions of the secretary of the interior is clear.

The order of Secretary Teller, of May 28, 1883, dispensed with the assignment of losses in the selection lists by the company, and imposed the burden of assignng such losses upon the general land office.

It appears by the findings, as above stated, that the company filed in the proper land office its selection list embracing the tract in question, claimed under its grant, and paid to the receiver the fees required by law; that such list was examined and compared by the register and receiver, and the filing of it allowed and approved, and they certified that it was filed by the duly authorized agent of the company. Further than the order of Secretary Teller, of May 28, 1883, the instructions in the interior department at the time, governing the filing of selection lists, were as follows:

"Third—The state, through its grantee, or the grantee, as the case may be, is required to file with the register and receiver of the proper land office, descriptive lists of the tracts of land claimed as inuring under the grant within the sections of * * * miles each along the line of route on both sides thereof, to be dated and verified by the signature of the selecting agent."

Copp's (Western) Land Owner, vol. 1, p. 70.

These instructions and the order of Secretary Teller comprised all the directions of the secretary of the interior, under which the list of 1883 was filed and this selection was therefore in accordance with the words of the act of July 2, 1864, giving the right of indemnity selection. The court will take judicial notice of the rules and regulations of the Interior department. Wade on Notice, 2nd Ed. 729.

It is true that the selection list of 1883 was filed a short time before the promulgation of the order of Secretary Teller, of May 28.

The secretary of the interior in passing upon another tract involved in this identical list, filed at the Fargo land office, March 19, 1883, held that where no adverse claim intervened between the date of the selection and the promulgation of the order, the selection came within the provisions of the order. This ruling was made in the case of *Sawyer v. Northern Pacific R. R. Co.*, 12 L. D. 450, where the secretary said:

"This selection was made a short time previous to the order of Secretary Teller, allowing selection to be made without specification of loss. No adverse claim intervening between the date of the selection and the promulgation of the secretary, the selection came within the provisions of the order."

The circular of 1885 required that before further indemnity selections should be allowed, the company should specify losses for which prior selections had been made. Complying with this requirement the company filed a list of lost lands equal in area to those selected in 1883. There was

no requirement that the losses be matched or mated, tract for tract, with the selected lands. This was a strict compliance with the circular of 1885, as construed by the secretary of the interior.

In the case of *Sawyer v. N. P. R. R. Co., supra,* the secretary considers this identical list of losses in bulk filed in the Fargo land office, October 12, 1887, and decides that the filing of this list constituted a compliance with the order of August 4, 1885.

There was no specific requirement that losses be arranged tract for tract with lands selected until 1893. In *St. P. M. & M. Ry. Co. v. Lambeck,* 22 L. D. 204, the secretary says:

"Prior to the decision in the case of *La Bar v. N. P. R. R. Co., supra,* (Oct. 14, 1893,) there was no specific requirement that the lost lands should be arranged tract for tract with the selected lands."

Anticipating this requirement, however, the company rearranged its list of losses in bulk, set opposite to the land in controversy a tract of equal area, situated in Wisconsin, and excepted by disposition prior to definite location, and filed this rearranged list February 23, 1892. Under the construction of the grant then in force, this loss was a valid basis.

When, however, in 1895, the secretary held that the grant to the company did not extent east of Superior City, instructions were issued allowing sixty days for the filing of new bases for selections, for which Wisconsin losses had been specified and the loss filed by the company within the time prescribed is conceded to be a valid loss.

No doubt can exist as to the authority of the secretary to allow such substitution. In the absence of an *intervening* right, the question of the basis for an indemnity selection is solely a matter between the United States and the railroad company. The company is required by its grant to select "under the directions of the secretary of the interior," and as indicated by the statement of the secretary in his order allowing the substitution, these Wisconsin losses were specified as required, because nearest to the lands selected, the indemnity in Minnesota being insufficient to satisfy the losses in that state.

The secretary has affirmed the position taken by him in allowing this substitution in two cases lately decided. *Gamble v. N. P. R. R. Co.*, 23 L. D. 351; *Brown v. N. P. R. R. Co.*, 24 L. D. 370.

It is important to observe that but one selection of the tract in controversy was made and that in 1883, all subsequent lists filed being for the purpose of complying with later instructions of the secretary. *O'Brien v. N. P. R. R. Co.*, 22 L. D. 135.

The attention of the court is requested particularly to the fact that no objection was ever raised to the selection either as to form or substance. The ground upon which it was cancelled, and the only ground, was that plaintiff was prior in time, and we have endeavored to show that in this the department was in error.

In any event it is submitted that the land in controversy was appropriated to the railroad com-

pany without selection for the reason that it appears that the commissioner of the general land office has determined that the total area of lands in the indemnity limits are insufficient to satisfy the losses from the place limits (Finding VIII, Transcript, p. 53). The rule is declared by this court in *St. Paul and Pacific R. R. Co. v. Northern Pacific R. R. Co.*, 139 U. S. 1-19, that under such circumstances the indemnity lands are appropriated without selection.

It is submitted that the judgment of the Supreme Court of North Dakota should be affirmed.

C. W. BUNN and
JAMES B. KERR,
Counsel for Defendants in Error.

Nos. 34, 47, 48 & 49.

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In the Supreme Court of the United States

OCTOBER TERM, 1900.

Sup. Ct. of Utah v. Hewitt
Dep't. Error in 34 & P.C. &
other ca

No. 34.

FRED HEWITT,
Plaintiff in Error,

vs.

EMIL SCHULTZ, et al.

Filed Oct. 11, 1900.

No. 47.

WILLIAM L. POWERS, et al.,
Plaintiffs in Error,

vs.

JACOB SLAGHT.

No. 48.

J. M. MOORE,
Plaintiff in Error,

vs.

D. B. STONE, et al.

No. 49.

J. M. MOORE,
Plaintiff in Error,

vs.

JOHN CARMODE,

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR IN NO. 34 AND PLAINTIFFS IN ERROR IN NOS. 47, 48 AND 49.

C. W. BUNN and
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SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR IN NO. 34 AND PLAINTIFFS IN ERROR IN NOS. 47, 48 AND 49.

We purpose in this additional brief to set forth succinctly, separate from other considerations, the

ruling of Secretary Vilas in the somewhat celebrated *Guilford Miller* case, 7 L. D. 100, followed by Secretary Smith in *Northern Pacific Railroad Company v. Davis*, 19 L. D. 87, and our own views upon the points decided in those cases.

Sections 3 and 6 of the Northern Pacific act of July 2, 1864, read as follows:

> "Sec. 3. *And be it further enacted*, That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any state, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption, or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections * * *.

Sec. 6. *And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act, but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby extended to all other lands on the line of said road, when surveyed excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale."

Secretaries Vilas and Smith, in the cases above referred to, (a) express doubts as to there being generally any implied power of executive withdrawal, and (b) hold two propositions of law applicable specially to the Northern Pacific grant: *first*, that in section 6 is an express reservation or withdrawal of place lands, which is by implication a negative upon any implied authority in the Secretary to withdraw indemnity lands, even if such power would otherwise be held to exist; *second*, that section 6 contains an express extension of the pre-emption and homestead laws "to all other lands on the line of said road when surveyed," which is

said to include *both even and odd sections within the indemnity belt.*

I.

THE IMPLIED POWER OF WITHDRAWAL.

Section 3 of the act makes a grant of quantity and it is clear that congress, in providing an indemnity belt, intended it should be more than a promise to the ear, and that it should be available to fill the losses in place lands. It is also clear that the lands in the indemnity belt could not be available for this purpose under the rule declared by the Secretary in the Miller case.

By act of June 2, 1862 (12 Stat. 413) congress had extended the right of pre-emption to unsurveyed as well as surveyed lands, and but for the exercise of the power of executive withdrawal, the entire indemnity belt of the grant would have been subject to appropriation for a long period, during which the company could have made no selection.

The right of selection was in terms limited to odd-numbered sections, and until the indemnity lands were surveyed the odd sections must remain unascertained.

It appears that even under the protection of withdrawals the lands in the indemnity limits fell far short of being sufficient to satisfy the losses.

That congress intended the right of indemnity conferred by the act of 1864 to be a substantial right is shown by the passage of the joint resolution of May 31, 1870 (16 Stat. 378). By this resolution the

company was given the right in any state or territory to select odd-numbered sections of land within ten miles beyond the limits prescribed in the act of 1864, in lieu of lands lost from the place limits between the date of the grant and the date of definite location, wherever the area of the first indemnity belt was insufficient. It is not reasonable to suppose that congress conferred a right of selection by the act of 1864, which was a barren right without the usual protection of an executive withdrawal, when within six years it gave such plain evidence of its intention that the company should receive the full quantity of land which the act purported to grant.

The implied power of withdrawal in aid of works of public improvement is a necessary power well settled to exist. *Wolcott v. Des Moines Company*, 5 Wall. 681; *Grisar v McDowell*, 6 Wall. 363; *Williams v. Baker*, 17 Wall. 144; *Wolsey v. Chapman*, 101 U. S. 755; *Dubuque, etc., Railroad Company v. Des Moines, etc., Railroad Company*, 109 U. S. 329; *Cedar Rapids, etc., Railroad Company v. Herring*, 110 U. S. 27; *St. Paul, etc., Railroad Company v. Winona, etc, Railroad Company*, 112 U. S. 720; *Buttz v. Northern Pacific Railroad Company*, 119 U. S. 55; *St. Paul & Pacific Railroad Company v. Northern Pacific Railroad Company*, 139 U. S. 1; *Bullard v. Des Moines and Fort Dodge Railroad*, 122 U. S. 167; *Hamblin v. Western Land Company*, 147 U. S. 531; *Riley v. Welles*, 154 U. S. 578; *Wood v. Beach*, 156 U. S. 548; *Wisconsin Central Railroad Company v. Forsythe*, 159 U. S. 46; *Spencer*

v. McDougal, 159 U. S. 62; *Northern Pacific Railroad Company v. Musser-Sauntry Company*, 168 U. S. 604.

It is the same as the power of withdrawal by the president, exercised without challenge in numerous cases for a hundred years, in establishing reservations for military purposes and for the Indians and for other purposes. See with reference to Indian reservations report of Public Land Commission, 1883, pages 240 to 243; with reference to military reservations report of Public Land Commission, pages 249 to 264. See also with reference to reservations for reservoirs at the head waters of the Mississippi in Minnesota and of the St. Croix in Wisconsin, report of Public Land Commission, pages 676 to 678. In the report of the Commissioner of the General Land office for the year 1888, pages 232 to 241, appears a statement of more than three hundred and fifty withdrawals on account of railroad grants covering a period of nearly forty years.

In *Wilcox v Jackson*, 13 *Peters*, 498, the court considered the effect of a reservation in 1804 by the War Department of a tract of land for military purposes and for an Indian agency, and held that this was a reservation by the President and took the land out of the operation of the pre-emption law. And in *Wolsey v. Chapman*, 101 U. S. 755, 769, this court held that an order by the Commissioner of the General Land Office constituted a reservation "by proclamation of the President."

In the case of *Grisar v. McDowell*, 6 Wall. 363,

this court passed upon the effect of an order made by the President of the United States through the War Department in 1850, reserving a tract of land for military purposes. Considering the authority of the President to make this order, the court said (p. 381):

> "But further than this: from an early period in the history of the government it has been the practice of the president to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses.
>
> The authority of the president in this respect is recognized in numerous acts of congress. Thus, in the pre-emption act of May 29th, 1830, it is provided that the right of pre-emption contemplated by the act shall not 'extend to any land which is reserved from sale by act of congress, *or by order of the president*, or which may have been appropriated for any purpose whatever' (4 Stat. at Large, 421.) Again in the pre-emption act of September 4th, 1841, 'lands included in any reservation by any treaty, law, *or proclamation of the president* of the United States or reserved for salines or for other purposes,' are exempted from entry under the act (5 Id. 456). So by the act of March 3d, 1853, providing for the survey of the public lands in California, and extending the pre-emption system to them, it is declared that all public lands in that state shall be subject to pre-emption, and offered at public sale, with certain specific exceptions, and among others 'of lands appropriated under the authority of this act, *or reserved by competent authority*' (10 Id. 246). The provisions in the acts of 1830 and 1841 show very clearly that by 'competent authority' is meant the authority of the president, and officers acting under his direc-

tion. (*Wolcott v. Des Moines Company*, 5 Wall. 688)."

In the case of *Wolcott v. Des Moines Company*, 5 Wall. 681, the following facts appeared: By act of congress of August 8, 1846, there was granted to the then territory of Iowa:

> "For the purpose of aiding said territory to *improve the navigation of the Des Moines river from its mouth to the Raccoon Fork*, so-called, in said territory, one equal moiety in alternate sections, of the public lands, in a strip five miles in width on each side of the river."

It appeared that the Des Moines river flows from the northern boundary of Iowa and empties into the Mississippi river at the southeast corner of the state, and receives the waters of the Raccoon Fork about the middle of the state. The extent of the land grant under this act was the subject of continuous conflict of opinion. For a time it was held by the officers of the land department that the grant extended the full length of the Des Moines river in the territory, and then that it extended only to the mouth of the Raccoon Fork. The courts were also divided upon the question until the latter construction was finally placed upon the act by this court in *Railroad Co v. Litchfield*, 23 How. 66. By the terms of the grant, the lands inuring to the territory were to be selected subject to approval of the secretary of the treasury, and, under the construction of the act that the grant extended above the Raccoon Fork, thousands of acres so situated were patented under the grant and all of the odd numbered sections within five miles of the river

above Raccoon Fork were withdrawn. Then came the decision by this court, holding that the grant did not extend above Raccoon Fork. The validity of the executive order of withdrawal of the odd-numbered sections above the Fork was presented in this wise: May 15, 1856, congress passed an act granting to the state of Iowa to aid in the construction of certain specified railroads, every alternate section (designated by odd numbers) for six sections in width on each side of said roads, with the following proviso:

> "That any and all lands heretofore reserved to the United States by any act of congress, or *in any other manner by competent authority, for the purpose of aiding in any objects of internal improvements, or for any purpose whatsoever*, be and the same is hereby, reserved from the operation of this act, except so far as it may be found necessary to locate the routes of the said railroads through such reserved lands."

It was contended that this grant to the state for the benefit of the railroads passed title to the lands covered by the executive withdrawal above Raccoon Fork. It was admitted that these lands passed unless excluded by the proviso. The court sustained the validity of the withdrawal, and said:

> "It has been argued that these lands had not been reserved by competent authority, and hence that the reservation was nugatory. As we have seen, they were reserved from sale for the special purpose of aiding in the improvement of the Des Moines river—first, by the secretary of the treasury, when the land department was under his supervision and control, and again by the secretary of the interior,

after the establishment of this department, to which the duties were assigned, and afterwards continued by this department under instructions from the president and cabinet. Besides, if this power was not competent, which we think it was ever since the establishment of the land department, and which has been exercised down to the present time, the grant of 8th August, 1846, carried along with it, by necessary implication, not only the power, but the duty of the land office to reserve from sale the lands embraced in the grant. Otherwise its object might be utterly defeated. Hence, immediately upon a grant being made by congress for any of these public purposes to a state, notice is given by the commissioner of the land office to the registers and receivers to stop all sales, either public or by private entry. Such notice was given the same day the grant was made, in 1856, for the benefit of these railroads. That there was a dispute existing as to the extent of the grant of 1846 in no way affects the question. The serious conflict of opinion among the public authorities on the subject made it the duty of the land officers to withhold the sales and reserve them to the United States till it was ultimately disposed of."

To the same effect is *Wolsey v. Chapman*, 101 U. S. 755, and *Riley v. Welles*, 154 U. S. 578, where the same withdrawal is considered.

II.

THE FIRST POINT DECIDED BY THE SECRETARY.

We have endeavored to show that the right of indemnity conferred by the grant was unavailable without the usual withdrawals by the executive, and that this implied power exists from necessity and has been exercised without question for a century.

This power of withdrawal, based, as this court has said, on necessity, we should expect to find in case of the Northern Pacific grant. And, as it is a power usual and necessary, it must be held to exist here, as in other grants, unless Congress has quite clearly and explicitly stated to the contrary. This well recognized power cannot be denied in the administration of the Northern Pacific grant, in the absence of a plain and unmistakable negative of the power by congress. The secretary of the interior finds in the provisions of section 6, creating a withdrawal *of place lands on general route,* evidence that this withdrawal was intended to be exclusive of any withdrawal of *indemnity lands after definite location.*

The language of the sixth section, operating to effect a preliminary withdrawal, when the general route is fixed, of all odd-numbered sections of land within forty miles of the line of general route, is

passed on in *Buttz v Northern Pacific Railroad Company* 119 U. S. 55, as follows:

> "The sixth section declares that after the general route shall be fixed, the president shall cause the lands to be surveyed for forty miles in width on both sides of the entire line as fast as may be required for the construction of the road and that the odd sections granted shall not be liable to sale, entry or pre-emption, before or after they are surveyed, except by the company. * * * When the general route of the road is thus fixed in good faith and information thereof given to the land department by filing the map thereof with the commissioner of the general land office or the secretary of the interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side."

And immediately following, in the same opinion, the court declares the purpose of this preliminary legislative withdrawal:

> "The object of the law in this particular is plain; it is to preserve the land for the company to which, in aid of the construction of the road, it is granted."

It is by virtue of these provisions, so construed by this court, that the Secretary concludes, that it was the intention of congress that no withdrawal of *indemnity* lands should be made after the *definite* location of the road. He says:

> "Congress, the supreme power, having thus ordered a withdrawal from sale and entry of a portion of the lands within the limits of the grant, it must be assumed that it does so to the entire exclusion of any subordinate authority, and that its action on that behalf is intended to be exhaustive."

The Secretary loses sight, not only of the particular purposes for which this withdrawal on general route was provided, but of the intent of the whole act, as apparent from its liberal terms and a consideration of the circumstances under which the grant must be adjusted and which congress must have anticipated.

The preliminary withdrawal was for the purpose of securing the company between the time of filing its map of general route and its map of definite location. It was, of course, in contemplation that the general route of the road would be located within a comparatively short time after the passage of the granting act, but that it would require a much longer period to complete the explorations and accurate surveys necessary to a final definite location of the line. This, in fact, turned out to be the case, for, although the maps of general route were filed in 1870, 1872 and 1873, the final maps of definite location were not filed until 1884. The preliminary withdrawal of forty miles on each side of the line of general route, provided by congress to remain in force up to the time of definite location, was amply sufficient to substantially secure the rights of the company during that period. The line of the road being only approximately determined by the map of general route, lands in the indemnity belt, not then ascertained as such, would have a very remote speculative value, and the rush of settlers to appropriate these lands, induced by the prospect of a railroad and the consequent development of the country, could not have been looked

for until the date of the definite location, when, for the first time their proximity to the railroad would be assured.

Moreover, the indemnity belt was not fixed by the *general* route map. It could be determined only after *definite location*. The two classes of lands are radically different. To place lands the title passed upon definite location; but to indemnity lands the title passed only upon selection lawfully approved. The two withdrawals are entirely distinct and do not depend on the same reason or principle. Therefore there is no legitimate inference that congress, by providing withdrawals of *place* lands on filing map of *general* route, intended to prohibit the secretary from exercising his accustomed power to withdraw *indemnity* lands after the *definite* location was made.

It is submitted that this preliminary legislative withdrawal, instead of evidencing an intention on the part of congress, that this exercise of the power of withdrawal should be exclusive, shows a disposition to protect the company in its full rights under the grant. As before stated, the withdrawal on general route was ample to protect the company up to the time of the definite location of its line, when its present grant of lands in place took effect and the limits of its indemnity belt became fixed. When this point was reached the function of the withdrawal on general route was fulfilled and at the same time by the terms of the grant, the right of selection of indemnity arose, the direction of which was expressly committed to the secretary of the interior.

Referring again to the case of *Wolcott v. Des Moines River Company*, 5 Wall. 681, it will be observed that the court says that the granting act there under consideration *"carried along with it, by necessary implication, not only the power, but the duty of the land office to reserve from sale the lands embraced in the grant, otherwise its object might be utterly defeated."*

A careful examination of the act there in question (August 8, 1846, 9 Stat. 77) discloses that the provision referred to by the court was the requirement that the lands granted should be selected by an agent of the territory, *"subject to the approval of the secretary of the treasury of the United States."*

Place this provision side by side with the provision of section three of the Northern Pacific granting act, giving the right of indemnity, which is as follows: *"other lands shall be selected by said company in lieu thereof, under the direction of the secretary of the interior;"* and the conclusion follows that the Northern Pacific grant carried with it not only the power, but the duty to reserve the indemnity lands for the benefit of the company.

The proposition laid down by the Secretary of the Interior where he says:

> "Congress, the supreme power, having thus ordered a withdrawal from sale and entry of a portion of the lands within the limits of the grant, it must be assumed that it does so to the entire exclusion of any subordinate authority, and that its action on that behalf is intended to be exhaustive,"

meets with a conclusive answer in the case of *Wood v. Beach*, 156 U. S. 548.

In this case Wood attempted to acquire land as a homestead which was within the indemnity limits of the grant to the Leavenworth, Lawrence & Galveston Railway Company, and also within the like limits of the grant to the Missouri, Kansas & Texas Railway Company. The land had been withdrawn under both grants by departmental orders before the settlement of Wood. After citing, with approval, the Des Moines river cases, the court says of the withdrawals for the benefit of the railroad companies:

> "These withdrawals were not merely executive acts, but the latter one, at least, was in obedience to the direct command of congress. Section 4 of the act granting lands to aid in the construction of what is now known as the Missouri, Kansas & Texas Railway (14 Stat. at Large, 290) is as follows.
>
> 'Sec. 4. And be it further enacted, that, as soon as said company shall file with the secretary of the interior maps of its line, designating the route thereof, it shall be the duty of said secretary to withdraw from the market the lands granted by this act in such manner, as may be best calculated to effect the purposes of this act and subserve the public interest'."

The grant for the benefit of the Missouri, Kansas & Texas road was a place grant of the odd-numbered sections within ten miles on each side of the line of road with a right of indemnity selection within twenty miles. The withdrawal thus sustained by this court was of indemnity lands.

Section 6 of the grant to the Northern Pacific Railroad Company provides that, after filing the map of general route, "*the odd sections of land*

hereby granted shall not be liable to sale, entry or pre-emption." This is the congressional withdrawal which the Secretary of the Interior insists must be held to be exclusive of any withdrawal by a subordinate authority. But in *Wood v. Beach*, a direction to the Secretary to withdraw from market "*the lands granted by this act*," was held not to exclude his authority to withdraw indemnity lands. If it be contended that indemnity lands are "*lands granted*," then the land in controversy was withdrawn by virtue of the provisions of section 6 above noted, but if indemnity lands are not "*lands granted*," then a statutory withdrawal of granted lands does not exclude the authority of the executive to withdraw indemnity lands.

In construing this grant in *Northern Pacific R. R. Co. v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 26 Fed. 551-554, Mr. Justice Brewer, sitting at circuit, indicates the rule which must control its construction. He says:

> "While the grant is vast, the line to be constructed in order to earn it, is continental. The grant was made because congress believed the public good required the road, and, in view of the length of the line, the character of the country through which it was to pass, the paucity of settlements therein, and the supposed difficulties in the operation of a road in that northern latitude, it is *fairer to presume that congress intended the freest bounty rather than to believe* that it burdened the grant with extra exceptions which when construction became feasible might largely deplete it of value."

III.

THE SECOND POINT DECIDED BY THE SECRETARY.

The second ground on which the Secretary places his decision in the Miller case is, that Sec. 6 contains an *express* prohibition on executive withdrawals of land for indemnity. This conclusion is based on the theory that the section extends to the indemnity lands the pre-emption and homestead laws. The language relied on is this:

> "But the provisions of the act of September eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May twenty, eighteen hundred and sixty-two, shall be and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre when offered for sale."

Section 6, after providing for the survey of lands within forty miles of the line of general route, which was the limit of the place lands, says, (a) that the lands "hereby granted" shall not be subject to sale or entry or pre-emption; (b) that the pre-emption and homestead laws are extended to "all other lands on the line of said road when sur-

veyed;" and (c) that the reserved alternate sections when offered for sale shall not be sold for less than $2.50 per acre.

Does the extension of the pre-emption and homestead laws include, as held by the Secretary, the indemnity lands? We contend not and say that the extension of those laws was only to the *even alternate sections within the place grant.*

It is plain that the statutory withdrawal of "lands granted" contained in the immediately preceding sentence of the section applies only to place lands. *Buttz v. Northern Pacific R. R. Co.*, 119 U. S. 55. Then follows the provision in question extending the pre-emption laws to "all other lands on the line of said road when surveyed." What lands are meant by the words quoted? "All other lands *on the line of said road*" do not certainly mean lands very remote from the road, and where is the line to be drawn? The natural inference is "other lands" in contradistinction to the lands just spoken of as reserved for the company; that is the alternate even sections within the place grant. This conclusion is strengthened by the qualification "when surveyed." The preceding langaage in the same section required a survey of the place lands. No survey was mentioned, or so far as the act shows contemplated, of the indemnity limits. So it was the same lands to be surveyed, as before in the same section provided, which were to be open to entry and settlement. This conclusion is reinforced by the sentence following, which says that the reserved alternate sections shall not be sold at less

than $2.50 per acre. There can be no question that these reserved sections are the even sections in the place limits, and the expression is synonymous with "all other lands on the line of said road." It would be as reasonable to include lands in the indemnity limits in one class as within the other. That the even sections in the indemnity limits are not increased in price to $2.50 per acre is clear from the reason for which the increase in price was made, namely, to enable the government to make good from the sale of the reserved sections the value of the lands granted. And this is the construction of the Interior Department. 19 *Land Decisions*, 381.

An examination of the pre-emption law as then in force, and a reading of this particular portion of the granting act in connection with that law, will show almost to a demonstration that the construction contended for is not only unreasonable but impossible. The pre-emption law of September 4, 1841 (5 Stat. 453), in section 10, after declaring the qualifications and conditions for acquiring public lands by pre-emption and extending the operation of the act to all *surveyed* lands, proceeds to define certain classes of lands to which the pre-emption right shall not extend, including land reserved for the support of schools, lands included within the corporate limits of towns, lands on which are situated salines or mines, and

> "No sections of land reserved to the United States as alternate to other sections granted to any of the states for the construction of any canal, railroad, or other public improvement."

This exception of sections reserved to the United States alternate to others granted for the construction of canals, railroads or other public improvements, remained in force until March 3, 1853. At that time the following statute was enacted (10 Stat. 244):

"An act to extend pre-emption rights to certain lands therein mentioned,

"*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, that the pre-emption laws of the United States as they now exist, be, and they are hereby, extended over the alternate reserved sections of public lands along the lines of all the railroads in the United States wherever public lands have been or may be granted by acts of congress; and that it shall be the privilege of the persons residing on any of said reserved lands to pay for the same, in soldiers' bounty land warrants, estimated at a dollar and twenty-five cents per acre, or in gold and silver or both together, in preference to any other person, and at any time before the same shall be offered for sale at auction: *Provided*, that no person shall be entitled to the benefit of this act, who has not settled and improved, or shall not settle and improve such lands prior to the final allotment of the alternate sections to such railroads by the general land office. *And provided further*, that the price to be paid shall in all cases be two dollars and fifty cents per acre, or such other minimum price as is now fixed by law or may be fixed upon lands hereafter granted; and no one person shall have the right of pre-emption to more than one hundred and sixty acres; *and provided further*, that any settler who has settled, or may hereafter settle on lands heretofore reserved on account of claims under French, Spanish or other grants, which have been or shall be hereafter declared by the supreme court of the United States to be invalid,

> shall be entitled to all the rights of pre-emption granted by this act and the act of fourth of September, eighteen hundred and forty-one, entitled 'An act to appropriate the proceeds of the public lands and to grant pre-emption rights,' after the lands shall have been released from reservation in the same manner as if no reservation existed."

The effect of this act was to modify materially the restrictive clause in the act of 1841 withholding from the operation of the pre-emption law sections reserved to the United States, alternate to others granted for the construction of railroads and other public improvements. The plain reading of the act of March 3rd, 1853, shows that its effect was to remove the restriction contained in the pre-emption law of 1841, as to sections alternate to railroad lands, from the passage of the act up to the time of "*final allotment of the alternate sections to such railroads by the general land office.*" The act was so construed by the rules of the general land office quoted below (1 Lester, p. 509):

SYNOPSIS OF RULES ADOPTED BY THE GENERAL LAND OFFICE FOR THE RAILROAD DESK.

> "First: By the act of 4th September, 1841 (No. 48). 'No sections of land reserved to the United States, alternate to other sections, granted to any of the states, for the construction of any canal, railroad, or other public improvement,' are subject to the operation of said act. But—
>
> "Secondly: The act of 3rd March, 1853 (No. 222), and Act of 27th March, 1854 (No. 234), materially modify the restrictive or interdictive clause in the Act of 1841. The act of March 3d, 1853, steps in and partly takes off

the inhibition contemplated in Act of 1841 by extending the pre-emption laws, at a price of $2.50 per acre, 'over the alternate reserved sections of public lands along the lines of the railroads of the United States,' *where the party had settled and improved the land* 'prior to the *final allotment* of the alternate sections to such railroads by the General Land Office.'

"Pre-emptions under this Act of 1853, attach within the following periods, to the *United States reserved sections*: 1. From the date of the 'definite location' of the road (viz., according to Attorney General's opinion, February 16, 1857), *when the route is surveyed and staked off on the ground*, until the 'final allotment,' by the General Land Office, of the railroad sections, and that is the *date of official list* certifying the latter sections to the State.

"We take the 'definite location' of the route as the period when this Act of 1853, with its $2.50 price applies, for the reason, not only that such seems to be the current of official decisions, but because, up to such 'definite location' there really are no United States alternate sections so set apart, as would be notice, or grounds of inquiry to purchasers. 2. Pre-emptions will not attach under this law to the *United States alternate reserved sections*, after the date of 'final allotment,' to the day of offering at public sale, for the reason that the interdicting clause in the Act of 1841, *again applies* to the United States alternate reserved sections aforesaid, the Act of 1853 only taking it off up to the period of final allotment."

It will be observed further, that the act of March 3rd, 1853, although partially removing the restrictions of the pre-emption law as to alternate sections of railroad grants increased the price per acre at which these lands might be acquired during the period contemplated by the act of 1853, to $2.50 per acre. The right

of settlers to acquire lands within the limits of railroad grants alternate to the lands granted for the benefit of railroad companies, was governed by these two acts at the time of the passage of the act of July 2, 1864.

Prior to 1853, when the pre-emption law was extended, under the restriction noticed, to these alternate sections, all grants for the construction of railroads, canals and other public improvements, had been made, not to incorporated companies, but to states for the benefit of such companies as might thereafter be incorporated and should comply with the legislation of the respective states controlling the disposition of land granted to them.

Under the practice just indicated and in force in 1853, considerable time would necessarily elapse between the date of the grant to a particular state and the time when the company organized under the legislation of such state would earn the land and the state would become entitled to demand from the general land office that the land in question be certified to it. From the very beginning, whenever land was granted to states to aid in the construction of railroads, although the states usually took title by present grant, yet the condition was uniformly imposed that the lands should not be sold or conveyed until the road or the part thereof opposite to the lands had been constructed. The fact of the construction and its approval was evidenced by the allotment of the lands and their certification by the general land office.

The grant of July 2, 1864, to the Northern Pa-

cific Railroad Company, was one of the first instances of a departure from the former uniform practice of granting lands for railroads to states instead of directly to railroad companies. The grant to the Northern Pacific being in terms a present grant and its rights to the lands enuring upon the definite location of its line, the period contemplated by the act of 1853 during which the restriction contained in the pre-emption law was removed could not arise. The act of 1853 extended the operation of the pre-emption law over the alternate reserved sections up to the time when the granted lands should be finally allotted by the general land office. Under the provisions of the act of July 2, 1864, no period would arise during which the act of March 3rd, 1853, could operate. As indicated by the construction placed by the department on the act of 1853, the alternate reserved sections were open to pre-emption from the time of the definite location of a road to the time of final allotment, it being considered that no sections could be identified as "alternate reserved sections" until the definite location of the line. Under the act of 1864, the company took a present title, without "final allotment" by the land office, to its granted sections immediately upon the filing of its map of definite location, and to continue and extend the spirit of the act of 1853, the particular language under consideration was inserted in the grant to the Northern Pacific Railroad Company. Without an extension in terms of the preemption and homestead laws to the reserved alternate sec-

tions in the place limits, no rights to these lands could be acquired by settlers, and it is important to observe that the same policy has been followed in every grant since the passage of the Northern Pacific act:

> Grant to California and Oregon Railroad Company, act of July 25, 1866, section 2 (14 Stat. 239); grant to Atlantic and Pacific Railroad Company, act of July 27, 1866, section 6 (14 Stat. 292); grant to Stockton and Copperopolis Railroad Company, act of March 2, 1867, section 5 (14 Stat. 548); grant to Oregon Central Railroad Company, act of May 14, 1870, section 2 (16 Stat. 94); grant to Texas and Pacific Railroad Company, act of March 3, 1871, section 12 (16 Stat. 573).

In all of these grants by various provisions the pre-emption law was extended to the reserved alternate sections.

After concluding that section 6 forbade a withdrawal of indemnity lands, the Secretary assigns as a reason for the insertion of such a provision in the Northern Pacific grant, the fact that it was a grant of unprecedented magnitude and that congress did not intend that the large body of lands in the indemnity limits should be withheld from settlement. But the language so construed by the secretary is as before stated merely the equivalent of the provisions inserted in every other grant made direct to a railroad company without regard to the quantity of lands granted.

That the effect of these provisions and of the language in section 6 of the Northern Pacific act was to carry out the spirit of the act of March 3,

1853, and not to forbid a withdrawal of indemnity lands is demonstrated by an examination of the act of July 13, 1866, granting lands to the Placerville and Sacramento Valley Railroad Company (14 Stat. 94). Section 5 of this act is almost word for word the same as section 6 of the Northern Pacific act. But the Placerville and Sacramento grant *contains no indemnity provision*, and the only possible purpose for inserting such language was in pursuance of the settled policy to cover the exception in the pre-emption law relating to the reserved sections.

And this was the construction placed upon section 6 of the Northern Pacific act before this exception of the pre-emption law was repealed in 1874 by the adoption of the Revised Statutes, and when the executive officers of the government were familiar with the history of legislation. The first interpretation put upon this language is found in a letter of Secretary Usher to the commissioner of the general land office, dated March 9, 1865, transmitting the so-called "Perham Map." This letter is quoted in the opinion in *Oregon & C. R. Co. v. U. S.*, 77 Fed. Rep. 69; 48 U. S. App. 6, and is as follows:

> "Department of Interior.
> Washington, D. C., March 9th, 1865.
>
> "Sir:—
>
> "Herewith I transmit a map upon which the 'general line' of the Northern Pacific Railroad, as adopted by the board of directors of that railroad company, is delineated; also a copy of the letter of the president of said company, dated the sixth instant, requesting that the

granted lands along said line be withdrawn from market. In view of the provisions of the 3rd and 6th sections of the act of congress, approved July 2, 1864, (Pamphlet Laws, pages 368-369), should you perceive no objection, I think that the odd-numbered sections along the line for ten miles in width on each side, in Minnesota and Wisconsin, and for twenty miles in width on each side along that part of the line extending through the territories westward to Puget Sound, may be withdrawn as requested, as preliminary to the final survey and location of said railroad. *The even-numbered sections along the line will, however, be subject to disposal by the United States, as provided in the 6th section of said act of congress.*

"Very respectfully, your ob't servant,

"J. P. USHER, Secretary.

"The Commissioner of the General Land Office."

The concluding sentence of this letter shows that in 1865 the provisions of section 6 were understood to refer to the even numbered reserved sections.

The conclusion of the Secretary, that section 6 in terms extends the homestead and pre-emption laws to lands in the indemnity limits and forbids their withdrawal, is reached without a consideration of the acts of 1841 and 1853 here discussed, and furthermore without giving effect to the words "when surveyed," which occur near the close of the section.

This restriction, that the pre-emption and homestead laws should not extend to the alternate reserved sections until surveyed, is in full accord with the policy of the act of 1853, for in 1853 unsurveyed lands were not subject to pre-emption.

Furthermore, it is important to observe that, by the passage of the act of June 2, 1862, (12 Stat. 413), two years before the passage of the Northern Pacific granting act, the right of pre-emption was extended to all lands belonging to the United States, to which the Indian title had been, or should be, extinguished "under the conditions, restrictions and stipulations" contained in the pre-emption law of 1841. By this it will be seen that under the construction of section 6, act of July 2, 1864, contended for by the Secretary of the Interior, congress must be held to have enacted that the pre-emption and homestead laws should be extended to the unsurveyed lands situated in the indemnity belt of the grant to the company when surveyed, although two years earlier the same laws had been extended to these same lands while still unsurveyed.

IV.

THE DECISION OF THE SECRETARY IS CONTRARY TO THE SETTLED CONSTRUCTION OF THE ACT.

For nearly twenty years, the construction placed by the Interior Department upon the Northern Pacific grant was uniform and sustained the power of withdrawal of indemnity lands. Between 1871 and 1887 more than forty withdrawals of indemnity lands were made under this grant, and the authority to make such withdrawals remained unquestioned until the decision by the secretary

in the Guilford Miller case in 1888. The reports of land decisions by the Secretary previous of 1888 are filled with cases in which the validity of these withdrawals was sustained. In the case of *Prest v. Northern Pacific Railroad Company*, 2 Land Decisions, 506 and in the letter of instructions of Secretary Teller, dated May 17, 1883, 2 Land Decisions 511, the question is considered at length and the power of withdrawal sustained. This construction prevailed during the terms of Secretaries Usher, Browne, Cox, Delano, Kirkwood and Teller.

In *United States v. Pugh*, 99 U. S. 269, this court said:

> "It is a familiar principle of interpretation that in a case of doubtful and ambiguous law, the contemporaneous construction of those who have been called upon to carry it into effect is entitled to great respect."

In *United States v. Moore*, 95 U. S. 763, this court gave one of the reasons for this rule:

> "The officers concerned are usually able men and masters of the subject. Not infrequently they are the draughtsmen of the laws they are afterwards called upon to interpret."

The construction of the executive officers, to which the courts give weight, is the *contemporaneous* and continued construction. Every intendment is in favor of the correctness of the practical construction with which Secretary Vilas was confronted when he announced the doctrine of the Guilford Miller case, but his own decision in that case overruling the long settled construction must rest solely upon his argument, which we have un-

dertaken to show ignores important and indeed controlling considerations and leads to a conclusion which is incorrect.

The conclusion of the supreme court of North Dakota sustaining the power of withdrawal is supported by *Thompson v. St. P. & M. & M. Ry. Co.*, 83 Fed. Rep .546, and *Southern Pacific Railroad Co. v. Grocck*, 87 Fed. Rep. 970.

In the latter case, decided by the circuit court of appeals for the Ninth circuit, the court construed section 6 of the grant by act of congress of July 27, 1866 (14 Stat. 292). Section 6 of this act is identical with section 6 of the Northern Pacific act. The court held, not only that section 6 did not forbid a withdrawal of indemnity lands, but constituted a statutory withdrawal after definite location.

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JAMES B. KERR,
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for 34, 47, 48 & 49

OCT. 10 1900

Clerk.

In the Supreme Court of the United States.

OCTOBER TERM, 1900.

Reply Brief of Defendants in Error

Filed Oct. 10, 1900.

No. 34.

FRED HEWITT,

Plaintiff in Error,

vs.

EMIL SCHULTZ, ET AL.

No. 47.

WILLIAM L. POWERS, ET AL.,

Plaintiffs in Error,

vs.

JACOB SLAGHT.

No. 48.

J. M. MOORE,

Plaintiff in Error,

vs.

D. B. STONE, ET AL.

No. 49.

J. M. MOORE,

Plaintiff in Error,

vs.

JOHN CARMODE.

REPLY BRIEF FOR DEFENDANTS IN ERROR IN No. 34 AND PLAINTIFFS IN ERROR IN Nos. 47, 48, AND 49.

C. W. BUNN and
JAMES B. KERR,
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Reply Brief for Defendants in Error in No. 34 and Plaintiffs in Error in Nos. 47, 48, and 49.

I.

It is argued in the brief for defendant in error in No. 47, and urged upon the oral argument in the other cases, that the relief sought against the patents, issued under the ruling of the Secretary of the Interior, is barred by the statute of limitations. This argument is based upon a misapprehension of the ground upon which the relief is claimed. The law was settled by the decision of this Court in *Wisconsin Central R. Co.* v. *Price County* (133 U. S. 496), that the title to indemnity lands does not pass until the approval of the selection by the Secretary of the Interior. But it does not follow that a prior right cannot be initiated by selection which will be protected and enforced against one who receives a patent upon an entry subsequently initiated. This Court enforced such a right in *St. Paul and Sioux City R. Co.* v. *Winona and St. Peter R. Co.* (112 U. S. 720), and *St. Paul and Pacific R. Co.* v. *Northern Pacific R. Co.* (139 U. S. 1). The relief awarded in those cases was under the rule declared by this Court in *Johnson* v. *Towsley*, (13 Wall. 72), and *Moore* v. *Robbins* (96 U. S. 530, 535), as follows:

> "But that in this class of cases, as in all others, "there exists in the Courts of equity the jurisdiction "to correct mistakes, to relieve against frauds and "impositions, and in cases where it is clear that "those officers have, by a mistake of law, given to "one man the land which on the undisputed facts "belonged to another, to give appropriate relief."

But it is equally clear, under the decisions of this Court, that until a contest pending in the Land Department has been finally determined and the title to the land involved has passed out of the United States, the Courts will not assume jurisdiction to correct such errors of law. This Court said, in Marquez *v.* Frisbie (101 U. S. 473, 475):

> "We have repeatedly held that the Courts will not "interfere with the officers of the Government while "in the discharge of their duties in disposing of "public lands, either by injunction or mandamus. "* * * And we think it would be quite as ob- "jectionable to permit a State Court, while such a "question was under the consideration and within the "control of the executive departments, to take juris- "diction of the case by reason of their control of the "parties concerned, and render decree in advance of "the action of the Government, which would render "its patents a nullity."

It follows, therefore, that the suits before the Court could not have been commenced while the matters involved were still *in fieri* before the Land Department, and that, therefore, the statute of limitations could not begin to run until title passed out of the United States.

II.

It was suggested upon the argument, as a reason for sustaining the construction of the Northern Pacific grant adopted by the Interior Department, that under this construction many entries have been allowed and a reversal of the rule would work a hardship. In this connection the attention of the Court is requested to the provisions of the Act of Congress, approved July 1, 1898 (30 Stat.

620). By this act it is provided that wherever any qualified settler has settled upon or purchased from the United States any portion of an odd-numbered section within the limits of the Northern Pacific grant, to which the Railroad Company makes claim, he shall have the option of relinquishing such land and taking an equal quantity elsewhere, or of retaining the land, and thereupon the railroad company is required to relinquish but receives the privilege of selecting an equal quantity of public land in any State through which its line runs.

The Railroad Company is not required to relinquish land which it has sold, but in such cases the adverse claimant has the privilege of transferring his claim. It is manifest that the provisions of the act are such as to allow the vast majority of settlers to retain their land.

The suggestion of counsel that a decision by this Court, affirming the validity of the withdrawal orders, would have the effect of dispossessing a large number of settlers is without foundation. The act of July 1, 1898, is sufficiently broad to afford substantial relief. The plain object of the act is to provide a remedy where errors, such as those apparent in the records in these cases, are corrected by the courts.

C. W. BUNN, and
JAMES B. KERR,
Of Counsel.

Supreme Court of the United States.

No. 34.—October Term, 1900.

Fred Hewitt, Plaintiff in Error, vs. Emil Schultz and Friederika Schultz. } In error to the Supreme Court of the State of North Dakota.

[January 7th 1901.]

Mr. Justice Harlan delivered the opinion of the Court.

This action is in the nature of ejectment. It was brought to recover the possession of the northeast quarter of section thirteen, township one hundred and thirty-two north of range fifty-seven west of the fifth principal meridian, situated in the county of Sargent, North Dakota, and of which the plaintiff Hewitt, now plaintiff in error, claimed to be the owner in fee in virtue of a patent issued to him by the United States.

The present defendants in error, who were defendants below, claimed title as purchasers from the Northern Pacific Railroad Company, which asserted ownership of the land in virtue of the act of Congress of July 2d 1864 granting public lands to that corporation to aid in the construction of a railroad and telegraph line from Lake Superior to Puget Sound on the Pacific coast by the northern route. 13 *Stat.* 365, *c.* 217.

There was a verdict and judgment in the court of original jurisdiction in favor of the plaintiff. But that judgment was reversed in the Supreme Court of North Dakota, and the cause was remanded with directions to dismiss the action. 7 *N. D.* 601.

This appeal questions the final judgment of the highest court of North Dakota upon the ground that it denied to Hewitt rights and privileges specially set up and claimed by him under the laws of the United States.

The record contains a voluminous finding of facts based upon the stipulation of the parties. In the view taken of the case by this court many of those facts are immaterial. The precise case to be determined is shown by the following statement, based upon the finding of facts:

On the 30th day of March 1872 the railroad company having by a map designated its *general* route from the Red River of the North to the Missouri River in the then Territory of Dakota, an Acting Commissioner of the General Land Office transmitted to the register and receiver of the proper local office a diagram showing such route, and in conformity with instructions from the Secretary of the Interior, directed them "to withhold from sale or location, pre-emption or homestead entry all the surveyed or

unsurveyed odd-numbered sections of public lands falling within the limits of forty miles" (the place or granted limits) as designated on such map. This order took effect April 22d 1872, on which day it was received at the local land office.

The land in dispute is coterminous with the general route of the railroad as indicated by the above map.

On the 11th day of June 1873 the railroad company having previously filed a map of the *definite* location of its line from the Red River of the North to the Missouri River in Dakota Territory, the General Land Office transmitted to the local land office a diagram showing the forty and fifty mile limits of the land grant along that line, and that office was directed "to withhold from sale or entry all the odd-numbered sections, both surveyed or unsurveyed, falling within those limits, and to hold subject to preemption and homestead entry only the even-numbered sections at $2.50 per acre within the forty-mile limits, and $1.25 per acre between the forty and fifty-mile or indemnity limits." This order was recorded at the local land office June 24th 1873.

The land in dispute, the finding of facts states, was coterminous with such line of definite location, was more than forty but within fifty miles of such line, that is, was within the indemnity limits, and was at the date of such location public lands to which the United States had full title, not reserved, sold, granted or otherwise appropriated, free from pre-emption or other claims or rights, and non-mineral in character.

It may be here observed that the controlling question in this case is whether it was competent for the Secretary of the Interior, upon receiving and approving the map of the definite location of the road, to make the above order of withdrawal in respect of the odd-numbered sections of lands within the *indemnity* limits, that is, of lands between the forty-mile and fifty-mile limits. This question will be adverted to after we shall have stated other facts material in the case.

On or about the 10th day of April 1882—the railroad company not having at that time made or attempted to make any selection of lands in the indemnity limits to supply losses in the place limits—Hewitt, being qualified to acquire and hold lands under the pre-emption laws of the United States, settled upon and improved the lands here in dispute with the intention of entering the same under the provisions of the act of Congress approved September 4th 1841, 5 *Stat.* 453, *c.* 16, and the acts supplemental thereto and amendatory thereof, authorizing the entry and purchase of public lands by citizens of the United States and by those who declared their intention to become citizens.

The township embracing the land in dispute was surveyed in July 1882, and the plat of survey was filed in the local land office on the 13th day of October of the same year.

On the 2d day of November 1882 Hewitt presented to the proper United States local land office a declaratory statement for this land, as provided by law, which was received, filed and placed upon the records of that office.

On the 19th day of March 1883 the railroad company filed in the local land office a list of selections of land "in bulk" embracing the land in dispute, which, as already stated, was within the indemnity limits of the railroad company.

Having from the day of his settlement upon the land until April 4th 1883 resided upon and cultivated the same as required by law, Hewitt, on the day last named, submitted his final proofs for the land, and duly tendered to the local land office the Government's price for it, together with all required fees. But such final proof was rejected, the reason assigned for such rejection being that the land had been withdrawn from entry under the act of July 2d 1864 granting lands to the Northern Pacific Railroad Company, and the acts of Congress supplemental thereto and amendatory thereof. From that decision Hewitt appealed to the Commissioner of the General Land Office, and on the 5th of October 1883 that officer affirmed the decision of the local land office.

On the 21st of June 1884, while Hewitt was in possession—he had been in actual possession since April 10th 1882, and had made valuable improvements on the land—the defendant Emil Schultz (his co-defendant being his wife) made a contract with the railroad company, by which the latter agreed, in consideration of $1,200, to sell and convey to the former the land in dispute. Thereupon Schultz entered upon the land, ousting Hewitt from actual possession, and taking up his residence thereon, and cultivating the same. Schultz having paid the above consideration, the railroad company conveyed the land to him. But the conveyance was not made until December 18th 1889.

Before that conveyance was made, namely, on the the 15th day of August 1887, the Secretary of the Interior revoked the above order withdrawing the odd-numbered sections of the indemnity lands from sale or entry.

Subsequently, October 12th 1887, the railroad company filed in the local land office a list designating an amount of lands equal to those "selected" in the list of March 19th 1883 as having been lost and excepted from the grant and within its place lands as defined on the map of definite location.

Of the decision of the Commissioner of the General Land Office on the 5th day of October 1883, Hewitt had no notice whatever until on or about August 1st 1888. On the latter day he applied for a review by the Commissioner. That review was had with the result that the decision of the local land office against Hewitt was reversed and set aside, his final proofs were admitted, and the selection by the railroad was held for cancellation.

In his opinion delivered September 25th 1888 the Commissioner said: "Said tract is within the 50-mile indemnity limit of the withdrawal for the benefit of the Northern Pacific R. R. Co., ordered by letter from this office, dated June 11th 1873, received at the local land office then at Pembina, June 24th 1873. The township was surveyed July 12th to 27th 1882, and the plat of survey was filed in your office on the 13th day of October following; the whole of said section was selected by the agent of the railroad company March 19th 1883, per list No. 6. . . The final proof submitted by applicant shows that he is a native born citizen, over 21 years of age, and a qualified pre-emptor, July 10th 1882; his improvements consisted of a frame house, 16x16 feet, stable 10x12 feet, and 20 acres of ground broken, the value of the same being estimated at $350. This declaratory statement was presented for filing within the time prescribed by law and was accepted by your office, a receipt issuing therefor. Under the late decision of the Hon. Secretary of the Interior in the case of the *Northern Pacific Railroad Company* v. *Guilford Miller*, 7 *L. D.* 100, it is held that the withdrawal of the indemnity lands for the benefit of said company was prohibited by the sixth section of the granting act, and, being in violation of law and without effect, was not operative to defeat the rights of *bona fide* adverse claimants under the general laws of the United States who settled on lands within such limits prior to the time when selection by the railroad had been made. In view of the fact that claimant established his actual residence and had permanent improvements upon the land prior to the Government survey or selection by the railroad company, his claim was superior thereto, and hence office decision of October 5th 1883 is set aside. Hewitt's final proof admitted, and the selection by the railroad company held for cancellation."

The next step was the filing by the railroad company on the 23d day of February 1892 of a rearranged list of selections—"tract for tract" selection—selecting the tract in dispute for one previously selected in Wisconsin but which was lost to the company.

The railroad company having appealed from the decision of September 25th 1888 in favor of Hewitt, the Secretary of the Interior by a decision rendered August 11th 1894 sustained Hewitt's right to the land. The Secretary, addressing the Commissioner of the General Land Office, said: "I have considered the appeal of the Northern Pacific R. R. Co. from your office decision of September 25th 1888, holding for cancellation its indemnity selection of the N. E. ¼, sec. 13, T. 132 N., R. 57 W., Fargo, North Dakota, on account of the prior claim of Fred Hewitt under his pre-emption filing upon which he has submitted proof. Your office decision is based upon the holding that prior to selection lands within said limits are subject to appropriation as other public lands, which is in harmony with the recent decisions of this Department in the case of *Jennie L. Davis* v.

Northern Pacific R. R. Co., 19 *L. D.* 87, and your office decision is therefore affirmed and the company's selection will be cancelled."

In conformity with the decision of the Secretary of the Interior, and based upon the final pre-emption proof made by Hewitt, a patent of the United States was issued to him on the 22d day of June 1895.

We have seen from the above statement that upon the filing and acceptance of the map of the definite location of the line of the Northern Pacific Railroad, the Land Office withdrew from sale or entry all the odd-numbered sections, surveyed and unsurveyed, within both the place and indemnity limits. Was it competent for the Secretary of the Interior, immediately upon the acceptance of the map of definite location, to include in his withdrawal from sale or entry lands within the indemnity limits? Was he invested with any such authority by the act of July 2d 1864, 13 *Stat.* 365, *c.* 217? Did Congress intend, by that act, to declare that when the railroad company indicated its line of definite location the odd-numbered sections outside of the forty-mile limit and within the fifty-mile limit, on each side of such line, along the whole of the line thus located, should not be subject to the pre-emption and homestead laws until it was finally ascertained whether the railroad company was entitled by reason of the loss of lands within the place or granted limits to go into the indemnity limits in order to obtain lands to meet such loss? An answer to these questions may be found in the act of July 2d 1864, as interpreted by the Land Department for many years past. We will now advert to such of the provisions of that act as are pertinent to the present inquiry.

By the third section of the act Congress granted to the Northern Pacific Railroad Company "every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the Territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is definitely fixed, and a plat thereof filed in the office of the Commissoner of the General Land Office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections: . . . *Provided, further*, That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like

quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest to the line of said road may be selected as above provided. . ."

This section has been often under examination by this court, and in repeated decisions it has been held that the act of Congress "*granted* to the Northern Pacific Railroad Company *only* public lands to which the United States had full title, not reserved, sold, granted or otherwise appropriated, and free from pre-emption or other claim or rights *at the time its line of road was definitely fixed*, and a plat thereof filed in the office of the Commissioner of the General Land Office"—lands that were not, at that time, free from pre-emption or other claims or rights being excluded from the grant. *United States* v. *Northern Pacific Railroad Co.*, 152 *U. S.* 284, 296; *Northern Pacific Railroad Co.* v. *Sanders*, 166 *U. S.* 620, 634, 635, *and United States* v. *Oregon, &c. Railroad Co.*, 176 *U. S.* 28, 42, *and authorities cited in each case.* The cases all speak of the granted lands as those within the place limits.

The fourth section of the act provided: "That whenever said 'Northern Pacific Railroad Company' shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands, situated opposite to, and coterminous with, said completed section of said road; and, from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid: *Provided*, That not more than ten sections of land per mile, as said road shall be completed, shall be conveyed to said company for all that part of said railroad lying east of the western boundary of the State of Minnesota, until the whole of said railroad shall be finished and in good running order, as a first-class railroad, from the place of beginning on Lake Superior to the western boundary of Minnesota: *Provided, also*, That lands shall not be granted under the provisions of this act on account of any railroad, or part thereof, constructed at the date of the passage of this act."

But so far as the present case is concerned the most material section of the act is the sixth. That section provided: "That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall

be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land *hereby granted* shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September 1841, [5 *Stat.* 453, *c.* 16,] granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public domain,' approved May 20th 1862, [12 *Stat.* 392, *c.* 75,] *shall be, and the same are hereby*, extended to *all other lands* on the line of said road, when surveyed, excepting those *hereby granted* to said company. And the reserved alternate sections shall not be sold by the Government at a price less than two dollars and fifty cents per acre, when offered for sale."

It is contended that, construing the third and sixth sections together, it is clear that the words, "the odd sections of land hereby granted" in the first part, and the words "excepting those hereby granted to said company" in the latter part of the sixth section refer to the lands described in the first section of the act—that is, to the odd-numbered sections in the place limits which were free from pre-emption or other claims or rights, and had not been appropriated by the United States prior to the definite location of the road; that as to "all other lands on the line of the said road, when surveyed," the act expressly declares that the provisions of the pre-emption act of 1841 and the acts amendatory thereof, and of the homestead act of 1862, should extend to them; that Congress took pains to declare that it did not exclude from the operation of those statutes any lands except those granted to the company in the place limits of the road which were unappropriated when the line of the railroad was definitely fixed; and that if at the time such line was "definitely fixed," it appeared that any of the lands granted, that is, lands in the place limits, had been sold, granted or otherwise appropriated, then, but not before, the company was entitled to go into the indemnity limits beyond the forty-mile and within the fifty-mile line, and under the direction of the Secretary of the Interior, and not otherwise, select odd-numbered sections to the extent necessary to supply the loss in the place limits. It is also contended that the object of the reference in the sixth section of the Northern Pacific act to the pre-emption and homestead acts could only have been to bring the odd-numbered sections in the indemnity limits within the operation of those acts.

This construction of the act of July 2d 1864 finds support in legislation enacted subsequently and before the railroad company filed its map of general route. By a joint resolution approved May 31st 1870 Congress declared: "That the Northern Pacific Railroad Company be, and hereby is, authorized . . also to locate and construct, under the provisions and with the privileges, grants and duties provided for in its act of incorporation, its main road to some point on Puget Sound, *via* the valley of

the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade Mountains to Puget Sound; and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the final location thereof, the amount of lands per mile granted by Congress to said company, within the limits prescribed by its charter, then said company shall be entitled, under the directions of the Secretary of the Interior, to receive so many sections of land belonging to the United States, and designated by odd numbers, in such State or Territory, within ten miles on each side of road, *beyond the limits prescribed in said charter*, as will make up such deficiency, on said main line or branch, except mineral and other lands as excepted in the charter of said company of 1864, to the amount of the lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July 2d 1864. . ." 16 *Stat.* 378.

Thus, it seems, a second indemnity limit was established into which the company could go and obtain lands in lieu of lands lost to it in the granted or place limits.

We do not find from the published decisions of the Land Department that the question of the power of the Secretary of the Interior, simply upon the definite location of the Northern Pacific Railroad, to withdraw from the operation of the pre-emption and homestead laws lands within the indemnity limits, was ever distinctly presented and disposed of prior to the year 1888. It was mooted in the case of the *Atlantic and Pacific Railroad Company*, reported in 6 *L. D.* 84, 87. The third and sixth sections of the charter of that company were the same as the third and sixth sections, above quoted, of the charter of the Northern Pacific Railroad Company. From the opinion of Secretary Lamar in that case, we infer that some of his predecessors had assumed that the power to withdraw lands in indemnity limits from sale or entry could be exercised upon the definite location of the railroad even before it had been ascertained by losses in place limits that the company must look to the indemnity limits in order to supply its grant. The Secretary said: "Were I called upon to treat as an original proposition the question as to the legal authority of the Secretary to withdraw from the operation of the settlement laws lands within the indemnity limits of said grant, I should at least have such doubts of the existence of any such authority as to have restrained me of its exercise. It would seem that the very words of the act, 'the odd-numbered sections of land hereby granted shall not be liable to sale or entry or pre-emption before or after they are surveyed, except by said company, as provided in this act,' of themselves indicate most clearly the legislative will that there should not be withdrawn for the benefit of said company from sale or

entry any other lands, except the odd-numbered sections within the granted limits, as expressly designated in the act. But when the provision following this, in the very same sentence, is considered—'but the provisions of the atc of September 1841, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers upon the public domain,' approved May 20th 1862, *shall be* and the same are hereby extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company'—it is difficult to resist the conclusion that Congress intended that 'all other lands excepting those hereby granted to said company' shall be open to settlement under the pre-emption and homestead laws, and to prohibit the exercise of any discretion in the executive in the matter of determining what lands shall or shall not be withdrawn. Waiving all questions as to whether or not said granting act took from the Secretary all authority to withdraw said indemnity limits from settlement, it is manifest that the said act gave no special authority or direction to the executive to withdraw said lands; and when such withdrawal was made it was done by virtue of the general authority over such matters possessed by the Secretary of the Interior, and in the exercise of his discretion; so that, were the withdrawal to be revoked, no law would be violated, no contract broken. The company would be placed exactly in the position which the law gave it, and deprived of no rights acquired thereunder. It would yet have its right to select indemnity for lost lands, but in so doing it would have no advantage over the settler, as it now has in contravention of the policy of the Government in denial of the rights unquestionably conferred upon settlers by land laws of the country, apparently specially protected by the provisions of the granting act under consideration."

But in 1888 the question was directly presented to Secretary Vilas in *Northern Pacific Railroad Company* v. *Miller*, 7 L. D. 100, 120, (referred to in the decision of the Commissioner of the General Land Office of September 25th 1888 upholding Hewitt's claim,) and it was there held, in an elaborate opinion, that the Northern Pacific act forbade the Land Department to withdraw from the operation of the pre-emption and homestead laws any lands within the indemnity limits of the grant made by the act of July 2d, 1864. The Secretary said:

"In my opinion, and it is with great deference that I present it, the granting act not only did not authorize a withdrawal of lands in the indemnity limits, but forbade it. The difference between lands in the granted limits, and lands in indemnity limits, and between the time and manner in which the title of the United States changes to and vests in the grantee, accordingly as lands are within one or the other of these limits, has been clearly defined by the Supreme Court, and it is sufficient to state the well-settled rules upon this subject.

"As to the lands in the primary, or granted, limits: 'The title to the alternate sections to be taken within the limit, when all the odd sections are granted, becomes fixed, ascertained and perfected in each case by the location of the line of road, and in case of each road the title relates back to the act of Congress.' *St. Paul R. R.* v. *Winona R. R.*, 112 *U. S.* 720, 726; *Mo., Kans. & Tex. R. R. Co.* v. *Kans. Pac. R. R. Co.*, 97 *U. S.* 491, 501; *Van Wyck* v. *Knevals*, 106 *U. S.* 360; *Cedar Rapids Co.* v. *Herring*, 110 *U. S.* 27; *Grinnell* v. *R. R. Co.*, 103 *U. S.* 739. As to indemnity limits: 'The time when the right to lands becomes vested, which are to be selected within given limits under these land grants, whether the selection is in lieu of lands deficient within the primary limits of the grant, or of lands which for other reasons are to be selected within certain secondary limits, is different in regard to those that are ascertained within the primary limits by the location of the line of the road. In *Ryan* v. *Railroad Co.*, 99 *U. S.* 382, this court, speaking of a contest for lands of this class, said: 'It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected, as it was for that purpose;' and the reason given for that is that 'when the road was located and the maps were made the right of the company to the odd sections first named became fixed and absolute. With respect to the lieu lands, as they are called, the right was only a float, and attached to no specified tracts until the selection was actually made in the manner prescribed.' The same idea is suggested, though not positively affirmed, in the case of *Grinnell* v. *Railroad Co.*, 103 *U. S.* 739. In the case of *Cedar Rapids Railroad Co.* v. *Herring*, 110 *U. S.* 27, this principle became the foundation, after much consideration, of the judgment of the court rendered at the last term, and the same principle is announced at this term in the case of the *Kansas Pacific Railroad Co.* v. *Atchison, Topeka and Santa Fé Co.*, *ante*, 414. The reason for this is that, as no vested right can attach to the lands in place—the odd-numbered sections within six miles of each side of the road—until these sections are ascertained and identified by a legal location of the line of the road, so in regard to the lands to be selected within a still larger limit, their identification cannot be known until the selection is made. It may be a long time after the line of the road is located before it is ascertained how many sections, or parts of sections, within the primary limits have been lost by sale or pre-emption. It may be still longer before a selection is made to supply this loss.' *St. Paul R. R. Co.* v. *Winona R. R. Co.*, 112 *U. S.* 720, 731.

"The consequence of this difference is, that until a valid selection by the grantee is made from the lands within the indemnity limits, they are entirely open to disposition by the United States or to appropriation under the laws of the United States for the disposition of the public lands. There

is nothing to the line bounding the indemnity limits to distinguish lands within it from any other public lands; the only purpose of that being to place a boundary upon the right of selection in the grantee to make good losses sustained within granted limits. This effect has been most explicitly declared by the Supreme Court in the case of the *Kansas Pacific Railroad Company* v. *The Atchison, Topeka and Santa Fé Railroad Company*, 112 *U. S.* 414, and in other cases. In that case, the court said of an order of the Commissioner of the General Land Office similar to this, so far as applicable to indemnity limits: 'The order of withdrawal of lands along the probable lines of the defendant's road made on the 9th of March 1863, by the Commissioner of the General Land Office, affected no rights which without it would have been acquired to the land, nor in any respect controlled the subsequent grant.' It also said of the indemnity limits under discussion there: 'For what was thus excepted from the granted limits other lands were to be selected from adjacent lands, *if any then remained, to which no other valid claim had originated.* But what unappropriated lands would thus be found and selected could not be known before actual selection. A right to select them within certain limits, in case of deficiency within the ten mile limit, was alone conferred, not a right to any specific land or lands capable of identification by any principles of law or rules of measurement. Neither locality or quantity is given from which such lands could be ascertained. If, therefore, when such selection was to be made the lands from which the deficiency was to be supplied had been appropriated by Congress to other purposes, the right of selection became a barren right, for until selection was made the title remained in the Government, subject to its disposal at its pleasure.'

"It was in view of this difference and its consequences that the language of the granting act was employed by Congress, by which it was explicitly provided that the provisions of the pre-emption and homestead laws 'shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company.' If lands within the indemnity limits are to be regarded as 'on the line of said road,' this declaration appears to me prohibitory of any withdrawal, for the benefit of this road. It might be that such lands could be withdrawn for some other public purpose, within executive authority to provide for, such, for example, as to constitute a reservation for Indians. But this language was introduced into the same section which declared the granted lands not to be liable to sale, &c., and, immediately following that declaration, and in the same sentence, so as obviously to mark the legislative intent to make clearly distinguishable the lands beyond the granted limits as being liable to disposition under those laws. Having so explicitly declared, it was not necessary to add a prohibition upon executive officers against withdrawal for the benefit of the road. It gave to any person

entitled under the pre-emption or homestead laws to take any such lands the absolute right to acquire any proper quantity thereof, in accordance therewith; and this right an executive officer could not deprive the settler of. The act as much makes that his right, as it makes it the right of the company to take the others.

"I cannot be satisfied with the idea that this language was so introduced in immediate qualification of and distinction upon the words rendering lands in the granted limits 'not liable to sale or entry' for the mere purpose of declaring 'what was already enacted by general laws.' The general laws applied without this declaration, and they applied more extensively than this would apply them, since by the general laws entries of other kinds might, if conditions concurred, be also made. The aim of this language was, as I am forced to read it, towards the availability to settlement of all lands not granted. It was a vast grant, and even as so limited, a threatening shadow to fall on the settlement of the Northwest. Well might Congress say, 'The lands granted you shall have, but you shall tie up no more from the actual settler to the prevention of development.'

It may be claimed that the words, 'all other lands on the line of said road,' do not embrace lands within the indemnity limits. That construction would seem still more to deny the Commissioner's power to withdraw them; since it cannot be supposed Congress intended him to withdraw lands not on the line of the road. But the phrase immediately after employed in the section—'the reserved alternate sections'—when speaking of the lands to which the double minimum price must be attached, seems to indicate clearly that Congress had, in the use of the power, a more comprehensive meaning than simply to include by it the lands of the even-numbered sections within the granted limits.

"The Supreme Court appears to have fairly set the question at rest in the case of *The United States* v. *Burlington, &c. R. R. Co.*, 96 *U. S.* 339, where it is said of the similar point raised in respect to the line then under consideration: 'And the land was taken along such line in the sense of the statute, when taken along the general direction or course of the road within lines perpendicular to it at each end. The same terms are used in the grant to the Union Pacific Company, in which the lateral limit is twenty miles; and if a section at that distance from the road can be said to be along its line, it is difficult to give any other meaning than this to the language. They certainly do not require the land to be contiguous to the road; and if not contiguous, it is not easy to say at what distance the land to be selected would cease to be along its line.'

"The general rule alluded to in the opinion that lands once properly withdrawn by executive order remain so until restored to market by like order or by statute is not questioned. But every such general rule yields to the will of the legislature in a particular case; and the considerations

presented are designed to show the grounds of my opinion that the legislation is in this case particular and exhaustive."

The same question arose in *Northern Pacific R. R. Co.* v. *Davis*, 19 *L. D.* 87, 90, and Secretary Smith expressed his concurrence in the views announced by Secretaries Lamar and Vilas. Referring to certain passages in the opinion of Secretary Vilas, he said: "These views alone would be sufficient, in my judgment, to sustain the conclusion reached in this case, but I am not left to stand upon them only, for Congress in the same section has gone further. Not content with ordering a withdrawal, that body expressly declared a prohibition against the making of any other withdrawal, when it said, in the next clause of the same sentence, that the provisions of the pre-emption and homestead laws 'shall be, and hereby are, extended to all other lands on the line of the said road when surveyed excepting those hereby granted to said company.' Here is an enactment in which the most comprehensive language is used. Having withdrawn the granted sections, 'all other' lands within the grant, along the line of the road, are being legislated for. It would seem, therefore, to follow logically, when it was commanded that the pre-emption and homestead laws be extended to 'all other lands,' it was all those within the limits of the grant which had not been otherwise disposed of by the act. The 'other' lands within the limits of the grant were the reserved sections and the odd and even sections within the indemnity limits, and it is clear to my mind that Congress meant all of those lands, for 'all' other lands surely can not mean only a portion of the other lands. *Qui omne dicit, nihil excludit* is a maxim well recognized in the construction of statutes and is applicable here. This aspect of the case is presented and fully discussed by Mr. Secretary Vilas in the *Guilford Miller* case, and concurring in his reasoning, it is not necesssary that there should be further elaboration of the argument. The views which I have herein expressed were entertained also by Mr. Secretary Lamar, and are clearly and tersely stated by him in his opinion, before quoted from, in the case of the *Atlantic and Pacific Railroad*, in 6 L. D. p. 87."

It was admitted at the hearing that the construction of the Northern Pacific act of 1864 announced by Secretary Vilas had been adhered to in the administration of the public lands by the Land Department. We are now asked to overthrow that construction by holding that it was competent for the Land Department, immediately upon the definite location of the line of the railroad, to withdraw from the settlement laws all the odd-numbered sections within the indemnity limits as defined by the act of Congress. If this were done it is to be apprehended that great if not endless confusion would ensue in the administration of the public lands, and that the rights of a vast number of people who have acquired homes under the pre-emption and homestead laws, in reliance upon the ruling of Secretary Vilas and his successors in office, would be destroyed. Of course, if

the ruling of that office was plainly erroneous, it would be the duty of the court to give effect to the will of Congress; for it is the settled doctrine of this court that the practice of a department in the execution of a statute is material only when doubt exists as to its true construction.

But without considering the matter as if it were for the first time presented, it is sufficient to say that the question before us cannot be said to be free from doubt. The intention of Congress has not been so clearly expressed as to exclude construction or argument in support of the view taken by Secretaries Lamar, Vilas and Smith, and upon which the Land Department has acted since 1888. "It is the settled doctrine of this court," as was said in *United States* v. *Alabama Railroad Co.*, 142 *U. S.* 615, 621, "that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the Government upon the faith of such construction may be prejudiced." These observations apply to the case now before us, and lead to the conclusion that if the practice in the Land Department could with reason be held to have been wrong, it cannot be said to have been so plainly or palpably wrong as to justify the court, after the lapse of so many years, in adjudging that it had misconstrued the act of July 2d 1864. The order of withdrawal by the Secretary of the Interior, upon which the title of the railroad company depends, being out of the way, there is no legal ground to question the title of the plaintiff to the land in dispute.

It is appropriate to refer to one other matter. It appears from the finding of facts that Mr. Lamoreux, when Commissioner of the General Land Office, issued a certificate, dated May 2d 1896, in which it was stated: "I have caused examination to be made of the records of this office relative to the grant to the Northern Pacific Railroad Company under acts of Congress approved July 2d 1864 and May 31st 1870, and certify that said records show that the total area of lands excepted from and lost to said grant within its primary limits amounts to 10,624,746.27 acres, and that there are within the first indemnity limits not to exceed 7,065,523.49 acres which are, or will be when surveyed, available for selection to satisfy the losses above referred to, thus leaving a known deficiency of 3,559,222.78 acres in said grant which cannot be satisfied from the limits as now recognized by this office."

It does not appear from the finding of facts that this certificate was given in any proceding pending between parties in the Land Department. On the contrary, the Commissioner of the General Land Office in a supplemental report for the year 1899 referred to the grant to the Northern Pacific Railroad Company, and said: "In view of the large quantities of nsurveyed

lands within the grant, and of the uncertainty of their availability for use in the satisfaction of it; of the litigation pending involving lands within the conflicting limits aforesaid and the true eastern terminus of the grant, and considering the proceedings now in progress under the act of July 1st 1898, and the right of selection for lands within the Mount Ranier forest reserve under the act of March 2d 1899, and the prospect of the creation of other forest reserves within the limils of the grant, I am of opinion that it cannot at this time be stated with any degree of certainty that there are or are not sufficient lands available to satisfy the Northern Pacific grant under the act of 1864." Besides, in *Northern Pacific Railroad Co.*, 25 *L. D.* 511, and in *Northern Pacific Railroad Co.* v. *Streib*, 26 *L. D.* 589, it was found that there never had been any ascertained deficiency in the grant to the Northern Pacific Railroad Company. In the above case in 26 *L. D.* the Secretary of the Interior, refering to the certificate of Commissioner Lamoreux, said: "Relative to the certification of a deficiency in the grant to this company [the Northern Pacific] made by your predecessor, it is sufficient to say that this Department has never given recognition to that certificate, nor has the company been relieved from the specification of losses in making indemnity selections on account of an ascertained deficiency in the grant." So that if the question whether there has been deficiency in the grant of lands to the Northern Pacific Railroad Company was at all material in the present case, no effect can be given to the certificate of Commissioner Lamoreux set out in the findings of fact.

In our opinion the plaintiff Hewitt was entitled to a judgment upon the facts found; and the judgment of the Supreme Court of the State reversing the judgment of the court of original jurisdiction and directing the dismissal of the action is itself reversed, and the cause is remanded for further proceedings consistent with this opinion.

Reversed.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 34.—October Term, 1900.

Fred Hewitt, Plaintiff in Error, vs. Emil Schultz and Friederika Schultz. } In error to the Supreme Court of the State of North Dakota.

[January 7, 1901.]

Mr Justice Brewer (with whom Mr. Justice Shiras concurs) dissenting.

I am unable to concur in the opinion and judgment just announced, and will state briefly the ground for my dissent.

From the beginning of land grants the Land Department has exercised the power of withdrawing from pre-emption and homestead entry any body of lands which in its judgment might be necessary for the satisfaction of the grant. And the existence of this power has been affirmed by this court in many cases, and without a single exception up to the present decision. The grant for the improvement of the Des Moines River terminated, as finally decided, at the Raccoon Fork of that river, about half way between the northern and southern boundary of the State of Iowa, yet a withdrawal of lands along that river above that fork, and up to the northern boundary of the State, was sustained. (*Wolcott* v. *Des Moines Company*, 5 Wall. 681; *Wolsey* v. *Chapman*, 101 U. S. 755.) It was held that as the extent of the grant was doubtful it was within the power of the Land Department and also proper for it to withdraw from settlement and sale all lands that might under any construction of the grant be needed to satisfy it. See among other cases sustaining this power of withdrawal: *Homestead Company* v. *Valley Railroad*, 17 Wall. 153; *Williams* v. *Baker*, 17 Wall. 144; *Dubuque &c. Railroad* v. *D., M. V. Railroad*, 109 U. S. 329, 332, 333; *Bullard* v. *Des Moines Railroad*, 122 U. S. 167, 170, 171, 176; *United States* v. *Des Moines &c. Co.*, 142 U. S. 510, 528; *Hamblin* v. *Western Land Co.*, 147 U. S. 531, 536; *Riley* v. *Welles*, 154 U. S. 578; *Wood* v. *Beach*, 156 U. S. 548; *Wisconsin Central Rd. Co.* v. *Forsythe*, 159 U. S. 46, 54, 57; *Spencer* v. *McDougal*, 159 U. S. 62, 64; *Northern Pacific Railroad* v. *Musser-Sauntry Co.*, 168 U. S. 604, 607.

It is to be assumed that when Congress makes a grant of a certain number of sections per mile it intends that its grantee shall obtain that number of sections. And when it provides that, if there be not within the place limits the requisite number of sections free from homestead or pre-emption

entry, the grantee may go into an indemnity limit and select enough to complete the full amount of the grant, its purpose is that within this territory added for selection the grantee shall receive a full equivalent for the deficiencies in the place limits. Action by the administrative department which tends to accomplish this purpose is, to say the least, not inconsistent with justice. And in order that it be not defeated it is certainly not unreasonable to temporarily withdraw from private entry a sufficient body of land within such indemnity limits.

That in the actual administration of the Northern Pacific land grant such withdrawals of land within the indemnity limits were proper is clear from the certificate of the Commissioner of the General Land Office, of date May 2, 1896, and in evidence in this case, to the effect that there is a known deficiency of 3,559,222 acres of the grant which cannot be satisfied from the limits recognized in the department. As this certificate was the only evidence in the case and was incorporated by the trial court into its findings of fact, it would seem that our inquiry in this direction should be limited thereby. But in the opinion of the majority there is a reference to a report of the Land Department, made a year after the decision in this case, and to two opinions of the Secretary of the Interior, announced about the time of the decision. In these some question is made of the accuracy of this certificate. It will be noticed that in neither report nor opinions is the fact of a deficiency denied, but only a suggestion as to the amount thereof. It is, of course, not a pleasant fact that by reason of the change in the ruling and practice of the Land Department the Northern Pacific Railroad Company fails to receive the full measure of its grant, and I do not wonder at any effort to discredit the fact or minimize the amount of such loss, but I submit that in the disposition of this case we ought to be guided by the evidence before us and not be misled by recent speculations of the department concerning what may yet be developed.

Much is said about the vastness of this land grant, but it must be remembered that it was a grant of lands within what was then a wilderness. Though it was made in 1864, nothing was done towards the building of the road until more than six years afterwards. Capital finds little temptation in a promise, no matter how great, of lands in an unknown wilderness.

The Land Department, believing that the power so constantly exercised by it and so frequently sustained by this court still continued, made orders of withdrawal as from time to time the maps of the line of definite location were filed and approved. Indeed, the question of power in respect to this very Northern Pacific grant was distinctly presented to Secretary Teller on May 17, 1883, and affirmed by him in a letter of instructions to the Commissioner of the General Land Office. (2 L. D. 511.) See also Id. 506. These withdrawals prior to the ruling hereafter noticed

were over forty in number, and included substantially all the odd-numbered sections within the ten-mile indemnity limit from one end of the road to the other. They continued with unbroken regularity until the ruling referred to.

The first section of constructed road of twenty-five miles in length was accepted by the President on January 6, 1873, as having been finished on October 18, 1872. The last section of constructed road was accepted on July 10, 1888, as having been finished on June 11, 1888. During these years of construction, and of course as inducement to the company to continue the work undertaken, these various withdrawals were made. Not until 1887 was there any question of their validity. The first intimation appears in an opinion announced by Mr. Justice Lamar (then Secretary of the Interior) on August 13, 1887, (6 L. D. 84, 87,) in which he said:

"Were I called upon to treat as an original proposition the question as to the legal authority of the Secretary to withdraw from the operation of the settlement laws lands within the indemnity limits of said grants, I should, at least, have such doubts of the existence of any such authority as to have restrained me of its exercise. It would seem that the very words of the act, 'the odd-numbered sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act,' of themselves indicate most clearly the legislative will that there should not be withdrawn for the benefit of said company from sale or entry any other lands, except the odd-numbered sections within the granted limits, as expressly designated in the act. But when the provision following this, in the very same sentence, is considered—'but the provisions of the act of September, 1841, granting pre-emption rights, and the acts amendatory thereof,' and of the act entitled 'An act to secure homesteads to actual settlers upon the public domain,' approved May 20, 1862, 'shall be, and the same are hereby, extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company'—it is difficult to resist the conclusion that Congress intended that 'all other lands, excepting those hereby granted to said company,' shall be open to settlement under the pre-emption and homestead laws, and to prohibit the exercise of any discretion in the executive in the matter of determining what lands shall or shall not be withdrawn."

Following this opinion Secretary Lamar revoked the orders of withdrawal theretofore made in behalf of some twenty-four corporations, the Northern Pacific Railroad Company among the number. Such revocation was undoubtedly legal, for the power which could order a withdrawal could revoke such order whenever in its judgment the appropriate time therefor had arrived. But such revocation did not disturb the rights which had become vested during the continuance of the orders of withdrawal. Thus consistency in the rulings and practice of the department was preserved.

Subsequently the question was presented to Secretary Vilas, who on August 2, 1888, in the case of the *Northern Pacific Railroad Company* v.

Miller, (7 L. D. 100,) ruled that all these withdrawals were void, thus upsetting that which had been done in the administration of this grant from the time of its inception.

It is unfortunate that during the years of construction, when it seemed important to hold out every inducement to the company to continue its work, the ruling and practice of the Land Department should have been unvarying in the line of securing to it the full amount of its grant, and that as soon as the road was completed and no further inducement to action by the company was needed the ruling of the Land Department should be changed, and that theretofore done with a view of securing to it the full amount of its grant be declared void. A change in the ruling of the department at that time was inauspicious.

Reference is made in the opinion to the duty of following in doubtful cases the construction placed by the Land Department. I fully agree with this, and I think it is a duty as incumbent upon the department as on the courts, and that when a construction has been once established in respect to a particular matter it should be followed by the department, unless plainly wrong; and that this court, when the question is presented, should hold to the original construction, especially if it be one which obtained during a score of years, and during all the time that the company was engaged in doing the work for which the grant was made, and should refuse to uphold a change made after that work was completed, and which has the effect of unsettling and destroying the rights of many created in reliance upon that construction.

Was the power of withdrawal rightfully exercised by the Land Department? It is not pretended that the Northern Pacific act contains any express denial or taking away of such power. The conclusion that it was taken away rests upon a mere implication, but it is familiar law that repeals by implication are not favored. If the old law and the new are consistent, and can with any reasonable interpretation of the latter be both enforced, they will be; and I respectfully submit that the same rule obtains as to powers belonging to and exercised by a department.

Was there any implied denial of this power to the Land Department? Section 6 of the granting act is relied upon by Secretary Vilas and by this court. I quote the section (13 Stat. 369):

"That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled 'An act to secure homesteads to actual settlers on the public

domain,' approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale."

Now, confessedly, every part of this section, except the clause commencing "but the provisions," and ending "to said company," applies solely to lands within the place limits, and has no reference or application to lands within the indemnity limits. By its connection, therefore, the natural application of this clause would be to lands within like limits. This natural application is enforced by the words "when surveyed," near the close of the clause, for there is an express provision (as appears in the first of the section) for a survey of the place limits, and there is no reference in the entire body of the act to any other survey. Further, the clause was seemingly necessary to secure beyond question to pre-emptors and those seeking homesteads a full and continuous right to the even-numbered sections within the place limits. The pre-emption law of September 4, 1841, (5 Stat. 456,) defining the classes of lands to which pre-emption rights should not extend, included therein the following:

"No sections of land reserved to the United States alternate to other sections granted to any of the States for the construction of any canal, railroad or other public improvement."

The act of March 3, 1853, (10 Stat. 244,) which extended the pre-emption right to the alternate reserved sections, contained this provision:

"*Provided*, That no person shall be entitled to the benefit of this act, who has not settled and improved, or shall not settle and improve, such lands prior to the final allotment of the alternate sections to such railroads by the General Land Office."

The exact scope of this limitation as applied to grants directly to railroad companies may not be entirely clear. Perhaps the limitation began with the approval of the map of definite location which, as frequently held, determines the time at which the right of the company to the odd-numbered sections is established, or perhaps, at least in cases where the grant was to a State instead of directly to a company, at the date of the official certification to the State of the list of alloted lands. Such at least seems to have been the opinion of the Land Office, as shown by the rules announced. (1 Lester, 509.) Be that as it may, some limitation was prescribed, and this clause was unquestionably introduced in order to remove all doubt as to the full and continuous right of pre-emption in respect to the alternate reserved sections. The same provision was found in several land grants, as, for instance, that to the California and Oregon Railroad Company, July 25, 1866, (14 Stat. 239); that to the Atlantic and Pacific Railroad Company, July 27, 1866, (14 Stat. 292); that to the Stockton and Copperopolis Railroad Company, March 2, 1867, (14 Stat. 548); that

to the Oregon Central Railroad Company, May 4, 1870, (16 Stat. 94); that to the Texas and Pacific Railroad Company, March 3, 1871, (16 Stat. 573.) That it did not apply to lands outside the place and within the indemnity limits is made clear by the fact that the provision was introduced into an act in which there were no indemnity limits, to wit, the act of July 13, 1866, granting lands to the Placerville and Sacramento Valley Railroad Company, (14 Stat. 94.)

Reference is made in the opinion of Secretary Vilas, approved by this court, to *United States* v. *Burlington & Missouri River Railroad Company*, (98 U. S. 334,) as indicative that the words "on the line of said road" necessarily extend to lands within the indemnity limits. But that case justifies no such inference. There were no place or indemnity limits in terms prescribed. There was simply a grant of ten alternate sections per mile on each side of the road "on the line thereof." When the right of the company attached it was found that the full complement of the grant could not be satisfied by the ten successive alternate sections, and on application of the company patents were issued to it for certain lands beyond the limits of those sections, and the court held on a bill to set aside these patents that the action of the Land Department was justified in that the full amount of the grant was intended and that there were no prescribed limits within which the grant must be satisfied. It was said (p. 340) that the words "do not require the lands to be contiguous to the road; and if not contiguous, it is not easy to say at what distance the land to be selected would cease to be along its line;" and again, "and the land was taken along such line in the sense of the statute, when taken along the general direction or course of the road within lines perpendicular to it at each end."

It is also suggested that to disturb this decision of the Land Department in 1888 might work confusion in the administration of the grant and entail hardship on many who have acted in reliance upon that ruling. I concede the hardship. Every change in the ruling of the Land Department in the administration of a grant will almost inevitably work hardship upon some, but it is well to note the comparative hardships, and no better illustration can be presented than the case at bar; and this irrespective of the loss by the company of a large portion of its promised lands. The plaintiff in error immediately upon his application for an entry of the tract in controversy was notified that it was withdrawn. He could then easily have changed his settlement to an even-numbered section and perfected his title thereto. He persevered, however, in his application, and was finally allowed pre-emption, paid his money and received his patent. If that action were now adjudged void he would have a claim for the money paid and a claim against a solvent debtor. (Rev. Stat. sec. 2362.) On the other hand, the defendant in error, who purchased from the railroad company in reliance upon the then ruling of the department, paid to the company the sum of

twelve hundred dollars, and has placed upon the lands improvements to the value of six hundred dollars. All this he loses; and while he may have a claim against the company for the amount of money he paid it, yet if it be true (as I am informed, although not appearing in the record) that mortgages upon the railroad company property have been foreclosed and all its property disposed of, his judgment will be simply against an insolvent corporation. In other words, instead of a claim for reimbursement against a solvent debtor he will have what is tantamount to a judgment against a vacuum, and this will be the experience of all who, during those many years, purchased from the company in reliance upon the then ruling of the department.

For the reasons thus outlined I dissent from the opinion and judgment, and I am authorized to say that Mr. Justice SHIRAS concurs herein.

True copy.

Test:

Clerk Supreme Court, U. S.